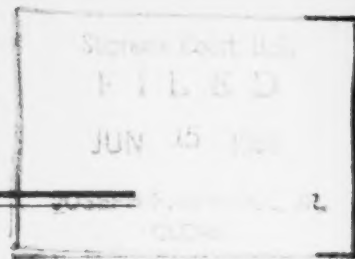


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87-2053

No. 88-



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

DOW JONES & CO., INC.
and RICH JAROSLOVSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Was the Due Process Clause of the Fourteenth Amendment violated when a judge of the United States Court of Appeals for the District of Columbia declined to recuse himself from participation in that court's consideration of this case?

2. Was the Due Process Clause of the Fourteenth Amendment violated when the United States Court of Appeals for the District of Columbia ruled that the District Court judge need not have recused himself and need not have referred the matter of his recusal to another judge when his own bias was questioned?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a not-for-profit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation and Cordite Fidelity, Inc., a Delaware corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Liberty Lobby, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 5, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals was decided on February 5, 1988, No. 86-7017. The opinion of the district court is reported at 638 F.Supp. 1149 (D.D.C. 1986).

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1988. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* with the Court of Appeals. The petition was denied on March 18, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1) (1987).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. Section 144 provides in pertinent part:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Title 28 U.S.C. Section 455 provides in pertinent part:

Disqualification of justice, judge, or magistrate

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice con-

cerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

STATEMENT OF THE CASE

This petition arises from a decision of the United States Court of Appeals affirming the District Court's grant of summary judgment dismissing a libel action brought by Liberty Lobby, Inc., a not-for-profit corporation. The basis for jurisdiction in the federal court was diversity of citizenship (28 U.S.C. Section 1332 (1982)).

On September 28, 1984, *The Wall Street Journal*, owned by the defendant Dow Jones & Co., Inc. published an article for the apparent purpose of discrediting President Reagan, which asserted that a "racial purist," associated in some fashion with President Reagan, was also associated with Liberty Lobby, Inc. *The Wall Street Journal* stated that the writings of Roger Pearson, the "racial purist," had "appeared in *Western Destiny*, a magazine published by the far right, anti-Semitic Liberty Lobby" and that Mr. Pearson "wrote several books on race and eugenics that were issued by Liberty Lobby's publishing arm" and which "are still sold by the National Socialist White People's Party, the Arlington, Va. based American Nazi group." Each allegation connecting Mr. Pearson to Liberty Lobby was untrue. Liberty Lobby did not publish *Western Destiny*. No books on race and eugenics or any other subject which were written by Mr. Pearson were ever published by Liberty Lobby. No books, magazines or pamphlets issued by Liberty Lobby are or were sold by the National Socialist White People's Party. During discovery the defendants, Dow Jones & Co. Inc., *et al.*, hereinafter Dow Jones, admitted that Liberty Lobby, Inc. had not published Mr. Pearson's works and asserted instead that Mr. Willis Carto, the treasurer of Liberty Lobby, had in their view, influenced or controlled the actions of

another entity which was responsible for some but not all of the alleged publications. Liberty Lobby Inc. denied this allegation as well.

During October 1985, Liberty Lobby, Inc. was the defendant in a lawsuit tried in the U.S. District Court for the District of Columbia, in which National Review, Inc. was the plaintiff. Counsel for National Review, Inc. contacted Mrs. Suzanne Garment, a writer for *The Wall Street Journal* and the wife of Leonard Garment, Esq., a public supporter and associate of National Review, Inc. At the initiation and request of counsel for National Review, Inc., Mrs. Garment agreed to write an article in support of National Review, Inc. and condemning and ridiculing Liberty Lobby, Inc. Mrs. Garment interviewed those associated with National Review, Inc., declined to speak with those associated with Liberty Lobby, Inc., was present in court only for the opening statements of counsel and secured all other information about the matter from counsel and others associated with National Review, Inc. and from her husband Leonard Garment, Esq.

On October 11, 1985, *The Wall Street Journal* published an article by Mrs. Garment in which the defamatory allegations about Liberty Lobby, Inc. published by Dow Jones on September 28, 1984, were repeated. Mrs. Garment did not write the portion of the article appearing under her byline which contained the republication of the defamation. Dow Jones refused to disclose the author of the republished libel asserting attorney-client privilege, which position the District Court sustained.

At the time Dow Jones republished its original defamation it apparently had already learned that its allegations were false and was developing a new position asserting that another entity published Mr. Pearson's works but that Mr. Carto was associated with both the other entity and Liberty Lobby, Inc.

Mrs. Garment, however, did compose a number of assertions about Liberty Lobby and its method of trying the case with National Review, Inc., all of which were untrue. Liberty Lobby, Inc. amended the complaint to include the causes of ac-

tion for defamation based upon the Garment article.

On February 28, 1986 at a hearing held before United States District Court Judge Thomas Penfield Jackson, counsel for Liberty Lobby, Inc., twice moved in open court for Judge Jackson to recuse himself due to his bias and prejudice against Liberty Lobby, Inc. and in favor of Dow Jones and due to the fact that Judge Jackson apparently had access to information in dispute in the case which information was not part of the record. At the hearing Judge Jackson stated that he had drawn conclusions about the deposition of Suzanne Garment after having access to "this entire deposition." However, the transcript of the deposition had not been filed, was not a record in the case and therefore access to that deposition must have been secured in a non-judicial and improper fashion. When counsel for Liberty Lobby, Inc. asserted that he "respectfully request[ed] the court to consider recusing itself in this matter," the court immediately denied the motion and stated that counsel could not be heard on the question.

On December 16, 1985 the defendants moved for summary judgment. On July 10, 1986 the District Court granted that dispositive motion. On September 25, 1986, having secured newly discovered information revealing the relationship between Judge Jackson and Leonard Garment, Esq., Liberty Lobby, Inc. filed a motion to disqualify Judge Jackson pursuant to Title 28 Sections 144 and 455 of the United States Code.

On August 7, 1986 Liberty Lobby, Inc. filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia and subsequently filed a brief with the United States Court of Appeals for the District of Columbia.

On November 4, 1987 the Clerk's office for the U.S. Court of Appeals for the District of Columbia notified counsel in writing that the panel of judges which would hear the case would be comprised of Judges Robinson, Edwards and Parker. Neither party objected to that panel.

On November 19, 1987 the Clerk's office for the U.S. Court of Appeals informed counsel that Judge Robinson had

been removed from the panel and replaced by Judge Bork.

On December 3, 1987 the Clerk's office for the Court of Appeals called the office of counsel for Liberty Lobby to assert that one of the three judges on the panel had just submitted a book review to be published in *The Wall Street Journal* and that *The Wall Street Journal* would pay a small sum of money to the judge if the review was published. The Clerk's office, while refusing to disclose the name of the judge, inquired if Liberty Lobby, Inc. objected to the participation of that judge on the panel in this case. Counsel for Liberty Lobby, Inc. stated that there would be no objection based solely upon the proposed book review.

On December 7, 1987 the Clerk's office notified counsel that another panel had been chosen for this case and that it would be comprised of Judges Edwards, Bork and Williams.

On November 23, 1987 Liberty Lobby, Inc. moved to disqualify Judge Bork from participating on the panel due to his close and continuing personal relationship with Leonard and Suzanne Garment, including but not limited to the fact that Mr. and Mrs. Garment were the leaders of the campaign to secure the confirmation for Judge Bork of his nomination to the United States Supreme Court.

On December 7, 1987 Judge Bork denied Liberty Lobby's motion to disqualify him.

On February 5, 1988 Liberty Lobby filed a motion with the United States Court of Appeals to reconsider its application to disqualify Judge Bork asserting that although Judge Bork had given as a reason for refusing to recuse himself his intention to remain on the Court of Appeals, he had, on the very day that his opinion was published in this case, resigned from the Court of Appeals.

On February 5, 1988 the Court of Appeals affirmed the decision of the District Court in granting summary judgment in an opinion written by Judge Bork.

On February 19, 1988 Liberty Lobby, Inc. filed a petition for rehearing and suggestion for rehearing *en banc* with the

United States Court of Appeals.

On February 25, 1988 the United States Court of Appeals denied Liberty Lobby's Motion to Reconsider its Motion for Disqualification.

On March 10, 1988 Liberty Lobby moved the United States Court of Appeals to reconsider its application for disqualification of Judge Bork due to the misconduct and deception practiced by defendants and their attorneys. The defendants and their attorneys had falsely certified to the Court of Appeals that they had served upon Liberty Lobby, Inc. a copy of their opposition when in fact they had not done so until after the Court had ruled upon the motion. Dow Jones and its attorneys subsequently admitted that they had not served Liberty Lobby, Inc. with their opposition until after the Court of Appeals had ruled on the matter. This bizarre practice by counsel for Dow Jones denied to Liberty Lobby an opportunity to respond to the brief.

On March 18, 1988 the Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. Judge Bork and the Court of Appeals violated the Due Process Clause of the Fourteenth Amendment when they permitted Judge Bork to decline to recuse himself from participation in this case. The close and continuing personal and professional relationship between Judge Bork and two of the principles in this case mandated Judge Bork to recuse himself in that it was apparent that his impartiality might be reasonably questioned. This Court in *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580 (1986), citing *Ward v. Village of Monroeville*, 93 S.Ct. 80, 83 (1972), held that a judge should recuse himself when the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

In *Aetna*, this Court citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), held that,

The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice."

The decision by Judge Bork and the ruling of the Court of Appeals stands in direct conflict with the teaching of this Court in *Aetna* and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 17, United States Supreme Court Rules.

2. The District Court and the Court of Appeals violated the Due Process Clause of the Fourteenth Amendment when they ruled that the District Court judge need not have recused himself and need not have referred the matter of his recusal to another judge when his bias was questioned appropriately and in a timely fashion. Liberty Lobby, Inc. submitted a fact-specific affidavit which could lead a reasonable person to the conclusion that the District Court was biased in favor of Dow Jones and biased against Liberty Lobby, Inc. The District Court, upon examining the affidavit and finding it legally sufficient was obligated by the statute to act no further and to refer the matter to another judge. He was relieved "from the delicate and trying duty of deciding upon the question of his own disqualification" since the affidavit demonstrated that the bias stemmed from an extra-judicial source. *U.S. v. Berger*, 255 U.S. 22 (1921); *In Manoe Finance Co. v. Goo*, 781 F.2d 1370 (9th Cir. 1986). Disqualification under the circumstances was mandatory. *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

ARGUMENT

I. THE REFUSAL OF JUDGE BORK TO RECUSE HIMSELF AND THE ENDORSEMENT OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE UN-AMBIGUOUS DECISION OF THIS COURT IN *AETNA LIFE INSURANCE V. LAVOIE*

The primary issue submitted to the Court of Appeals by Liberty Lobby, Inc. concerned the improper decision of the District Court which both refused to recuse itself and refused to refer the matter to another judge. Therefore, the decision by Judge Bork, apparently affirmed by the U.S. Court of Appeals, that he need not recuse himself, when his social and political relationship with central figures in the case was more intimate and continuous than was the relationship between the District Court and the same central figures in the case, was improper in view of Title 28 Section 455 of the United States Code and the teaching of this Court in *Aetna* and under the specific circumstances of this case was tantamount to a prejudgment of Liberty Lobby's primary argument. How could Judge Bork, who relied upon Mr. and Mrs. Garment to lead his campaign to become a member of the U.S. Supreme Court, who met with and consulted with them almost as he was deciding this case, who regularly played poker with Leonard Garment while he was deciding this case, who worked closely with Mr. Garment in the past and who resigned from the U.S. Court of Appeals to work with Mrs. Garment at the American Enterprise Institute and to serve as a "Commentator" for the *National Review* along with Mr. and Mrs. Garment, find that the District Court should have recused itself, for a relationship with Mr. and Mrs. Garment, when he, Judge Bork, refused to do so. All of these facts were set forth with accompanying documents when Liberty Lobby submitted its application to the U.S. Court of Appeals to recuse Judge Bork. (Motion, February 5, 1988)

Under the circumstances it is impossible for a reasonable person with knowledge of all of the facts to deny that the judge's impartiality might be reasonably questioned. 28 U.S.C. 455. *In re Manoe Finance Co. v. Goo*, 781 F.2d 1370, 1372-73 (9th Cir. 1986). The facts submitted to Judge Bork and the Court of Appeals in this case mandated judicial disqualification. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 112 (7th Cir. 1977).

Judge Bork temporarily retired from active service on the Court of Appeals while he and his public relations champion, Leonard Garment, Esq., aided by Suzanne Garment, carried on an unprecedented media campaign and composed and distributed to members of the U.S. Senate documents supporting Judge Bork's nomination. After that nomination was rejected, Judge Bork returned to service on the Court of Appeals apparently primarily to rule upon this case, although he had not been a member of the panel originally selected for this case. Clearly, there is an appearance, at the very least, that Judge Bork's conduct was partial. Recognized legal scholars questioned by the *Legal Times*, a law journal published in Washington, D.C., asserted that Judge Bork's participation was questionable. (*Legal Times*, December 14, 1987.) It cannot be asserted that a reasonable person could not reasonably question the impartiality of Judge Bork when, as we have seen, responsible law professors have done so.

Both Dow Jones, through its former employee, and present client, Suzanne Garment, and Judge Bork possessed all of the relevant information regarding the ongoing personal and professional relationship that Judge Bork shares with Mr. and Mrs. Garment. They were under a duty to disclose the relevant facts. The facts submitted to the Court of Appeals by Liberty Lobby, Inc. may not tell the entire picture of the close personal and professional relationship which exists between Judge Bork and the central figures in this case. Obviously, no discovery is available to Liberty Lobby, Inc. regarding this matter. For that reason Judge Bork and Dow Jones were obligated to be forthcoming

and in the absence of such action, as in this case, Judge Bork was particularly constrained to disqualify himself.

One of the reasons offered by Judge Bork in his memorandum in which he set forth the reasons why he would not recuse himself, is that many individuals took strong public positions for or against his confirmation and that he would be in the future "of greatly diminished usefulness to this Court" were he to establish a precedent by recusing himself in this case. (Memorandum Opinion, December 7, 1987, p. 3) This explanation however is flawed for two reasons. Leonard Garment and his wife were not two individuals who favored or opposed the confirmation; they led Judge Bork's campaign. Since it appears that Judge Bork had already decided to resign from the Court of Appeals when he wrote the opinion, in fact, the opinion was issued on Judge Bork's last day as a member of the court, it appears that Judge Bork's concerns about his usefulness to the Court in the future were offered disingenuously.

The gravamen of petitioner's concern is not just that Judge Bork had agreed to serve as a Commentator along with Leonard Garment and Suzanne Garment **before** he had written the opinion in this case, but that he had agreed to work for the *National Review* **before** he had written the opinion for the Court of Appeals in this case. The February 19, 1988 issue of *National Review* was distributed on February 2, 1988. The deadline for that issue occurred many days in advance of February 2. Thus during January 1988, the *National Review* wrote that Judge Bork, along with Suzanne Garment and Leonard Garment, would serve as a Commentator. That issue of the *National Review* published the cover design and photograph on its cover credited to Charles Bork, apparently the son of Judge Bork. A substantial portion of the complaint in this case was based upon an article written by Suzanne Garment, after consultation with her husband Leonard, regarding a lawsuit between Liberty Lobby, Inc. and the *National Review*. Mrs. Garment published an impassioned defense of the *National Review* and made entirely false statements about Liberty Lobby, Inc. in an article written

at the request of counsel for the *National Review*. It seems impossible to assert that the test set forth by this Court in *Aetna* and cited by various appellate courts thereafter, that in order "to perform its high function in the best way, justice must satisfy the appearance of justice," 106 S.Ct. at 1587 cited by *Matter of Yagman*, 796 F.2d 1165, 1178 (9th Cir. 1986) has been met by Judge Bork in this case.

In his opinion Judge Bork held that reliance upon an article published in the *National Review* was appropriate. (Opinion, February 5, 1988, p. 20). In addition, Judge Bork held that Suzanne Garment's discussion of the *National Review* trial was protected. Central to Judge Bork's reasoning throughout the opinion which he wrote for the Court of Appeals was his evaluation of the credibility of the *National Review* and the prerogatives of Suzanne Garment. Judge Bork, however had failed to disclose that his son had an apparent financial interest in the *National Review* and that he, Judge Bork, had already agreed to be united with Suzanne Garment and Leonard Garment as Commentators employed by the *National Review* before he passed upon the issues in this case which impacted directly upon Suzanne Garment, Leonard Garment and the *National Review*.

In addition, it appears that Judge Bork was less than candid when he published his memorandum opinion denying the motion for disqualification. Judge Bork asserted only that he served in the same administration with Leonard Garment in the past and that "we meet occasionally at social functions." (Memorandum Opinion, December 7, 1987, p. 4) While Judge Bork stated that Mr. Garment "played no role in my preparation for the hearings **or in any of my subsequent activities connected with the confirmation process**" (*Id.*, p. 4), Mr. Garment tells the story very differently. He told the *New York Times* that he and his son Paul visited the Borks on the eve of the Judge's scheduled meeting with President Reagan. Mr. Garment urged the Judge to carry on the fight and Judge Bork took the matter under advisement. Two days later, according to Garment, when Judge Bork announced that the fight would go on, "I called

him and said 'God Bless you.' " Mr. Garment added "I'm going to help you." Shortly thereafter Suzanne Garment and Leonard Garment wrote and circulated petitions denouncing the politicization of the Bork debate and in one week Garment worked with fifteen volunteer lawyers to produce ten briefs attacking sections of the Judiciary Committee Reports, according to *New York Times*, October 26, 1987.

On October 20, 1987 the *New York Times* described Leonard Garment as "a Washington Lawyer who has been advising Judge Bork." Six days later the *New York Times* reported that Leonard Garment and Judge Bork "consulted frequently" regarding Garment's campaign to aid his friend's effort to secure confirmation. In addition, the *New York Times* reported that Judge Bork, described as Mr. Garment's "long-time friend," authorized Mr. Garment to issue at least one statement on his behalf. (*New York Times*, October 26, 1987.)

When there were rumors that Judge Bork would ask that his nomination be withdrawn, Mr. Garment obtained Judge Bork's permission to deny the rumors on his behalf, the *New York Times* asserted. The *New York Times* also reported that its source was Leonard Garment.

On that same day, Suzanne Garment and Leonard Garment drafted a full page advertisement in support of Judge Bork's nomination which they caused to be published in the *Washington Post* under the headline "This Time They've Gone Too Far." Suzanne Garment and Leonard Garment paid \$35,000 for the advertisement. (*New York Times*, October 26, 1987.)

While the feverish activity by Suzanne and Leonard Garment on behalf of Judge Bork took place, Suzanne Garment's reputation as a journalist was very much in doubt due to her entirely inaccurate article which had been published in *The Wall Street Journal* and which was a basis for the lawsuit in this case. Following the substantial investment of money, time and effort by Suzanne and Leonard Garment in support of Judge Bork's confirmation effort, Judge Bork became a member of a panel,

although three other judges had previously been chosen, to pass upon the writing of Suzanne Garment and the credibility of the *National Review*. Judge Bork, who had before he wrote the opinion, already agreed to work with Suzanne and Leonard Garment for the *National Review* and to work with Suzanne Garment at the American Enterprise Institute, refused to disqualify himself asserting that his relationship with the Garments was casual. He then vindicated Suzanne Garment's reputation and held the *National Review* to be a credible source.

Liberty Lobby, Inc. does not contend that it is entitled to a friend in court. It does contend that it is entitled to an impartial determination of its claims and that Judge Bork's intrusion into this case and insistence that he remain in the case creates at the very least an appearance of impropriety in view of his relationship with Leonard Garment, Suzanne Garment and the *National Review*.

II. THE DISTRICT COURT JUDGE AND THE COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN THEY RULED THAT THE DISTRICT COURT JUDGE NEED NOT HAVE RECUSED HIMSELF AND NEED NOT HAVE REFERRED THE MATTER OF HIS RECUSAL TO ANOTHER JUDGE WHEN HIS BIAS STEMMED FROM AN EXTRA-JUDICIAL SOURCE AND HIS IMPARTIALITY WAS REASONABLY QUESTIONED

At a hearing held before the United States District Court Judge, Thomas Penfield Jackson, counsel for Liberty Lobby, Inc. moved on two separate occasions for the Court to recuse itself due to the apparent bias and prejudice demonstrated by the Court against Liberty Lobby, Inc. and for Dow Jones. Most striking was the very firm assertion made by the District Court that he reached fixed conclusions in the case since he had access to "this entire deposition" referring unequivocally to the

deposition of Suzanne Garment. While Liberty Lobby, Inc. respectfully asserts that the judge's conclusions were entirely inaccurate, it states without equivocation that since the transcript of the deposition had not been filed, and was not a record in the case, it had not been available to the District Court through judicial and proper methods. When counsel asserted that he "respectfully request[ed] the court to consider recusing himself in this matter," the court immediately denied the motion and denied counsel for Liberty Lobby, Inc. an opportunity to be heard on the matter. Thereafter the District Court granted the motion for summary judgment filed by Dow Jones.

On September 25, 1986 Liberty Lobby, Inc. filed a motion to disqualify Judge Jackson pursuant to Title 28 Sections 144 and 455 of the United States Code. In that motion which was accompanied by various exhibits and an affidavit by Mr. Carto, Liberty Lobby, Inc. established that Leonard Garment had been counsel for President Nixon and had succeeded John Dean in that capacity when Mr. Dean was dismissed during the Watergate scandal. The *New York Times* reported that Leonard Garment had suggested that John Mitchell would make an excellent campaign manager for Mr. Nixon. Mr. Garment's primary function as the new special counsel to President Nixon was to manage the situation resulting from the Watergate scandal including seven federal indictments for participating in conspiracy to cover up the facts. One of Mr. Garment's primary responsibilities apparently was related to the indictment of seven persons for the conspiracy referred to above. Another was the lawsuit filed against the Committee for the Reelection of the President. In both of those matters Thomas Penfield Jackson, Esq. appears to have had an involvement. One of the persons indicted was Kenneth Wells Parkinson, Esq., Mr. Jackson's law partner. Mr. Jackson also served as counsel for President Nixon's Finance Committee to Reelect the President. In addition, Mr. Jackson was counsel for Mr. Mitchell. Mr. Parkinson also served as attorney for the Committee to Reelect the President. Liberty Lobby, Inc. submitted to Judge Jackson, in its motion

to disqualify him, an affidavit which offered information to the effect that Mr. Mitchell had allegedly stated that it was useful to discredit Liberty Lobby, Inc. because that organization had been a thorn in the side of the administration.

A reasonable person examining the record referred to would be constrained to conclude that Mr. Garment and Judge Jackson had previously maintained a close and continuing professional relationship and that Mr. Jackson represented Mr. Mitchell who, it is asserted, approved of an effort to discredit Liberty Lobby.

At the outset when the complaint in this case focused entirely upon the original defamation complained of and before it was amended to include the defamatory article written by Suzanne Garment, Judge Jackson's conduct was appropriate. Neither party found fault with the court's rulings or statements. However, after Liberty Lobby, Inc. amended the complaint to include the defamatory passages written by Suzanne Garment, Judge Jackson's conduct dramatically changed. He was abusive to counsel for Liberty Lobby, Inc., made statements that were both untrue and unsupported by the record, and asserted that he had read the entire Garment deposition. Further, Judge Jackson improperly warned counsel for Liberty Lobby not to file a lawsuit in a related case. He asserted "and I would act with a good deal of circumspection before you do that." (Hearing Transcript, February 27, 1986, p. 19) "Circumspection" is a warning which puts a party on notice that he should be concerned about adverse possible consequences.

Neither Liberty Lobby, Inc. nor its counsel provided a copy of the Garment deposition to Judge Jackson who stated that his rulings denying Liberty Lobby's motion to compel answers to questions was based upon his reading of the entire deposition. Since the transcript of the Garment deposition had not been filed and was not part of the court record there is an appearance that Judge Jackson had access to that deposition in an extra-judicial fashion. A reasonable person might reasonably question, in view of Judge Jackson's relationship with Mr. Gar-

ment, the source of information about the deposition.

It was only Judge Jackson's dramatically altered conduct, commencing after the Garment article became a factor in the case, that caused Liberty Lobby, Inc., for the first time, to probe the relationship between Judge Jackson and Leonard Garment.

While the District Court refused to recuse itself and thereafter granted Dow Jones' motion for summary judgment, it cannot be said that the Court did so based upon an examination of the record. The District Court, relying upon a record it could not have seen properly, denied Liberty Lobby, Inc. an opportunity to conduct further discovery, to ask further questions and refused to compel Mrs. Garment to answer those questions which she had wrongfully refused to answer. The District Court then refused to permit counsel for Liberty Lobby, Inc. to state the basis for the recusal motion.

The single most important concern in these situations, as in every case, is ensuring that all parties are afforded a fair and complete opportunity to present their evidence and arguments.

Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986)

The affidavit and motion submitted by Liberty Lobby to disqualify Judge Jackson was timely and legally sufficient. See *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *United States v. Azhocar*, 581 F.2d 735, 738-40 (9th Cir. 1978); *cert denied*, 440 U.S. 907, 99 S.Ct. 1213 (1979); *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert denied* 429 U.S. 925, 97 S.Ct. 327 (1976). If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under Section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for determination on its merits. *Azhocar*, 581 F.2d at 738. This the District Court refused to do.

A motion properly brought pursuant to Section 144 will raise a question concerning recusal under Section 455(b)(1) as well as Section 144. *U.S. v. Sibla*, 624 F.2d 864 (9th Cir. 1980). In *Sibla* the court asserted that Section (b)(1) simply provides a specific example of a situation in which a judge's "impartiality might reasonably be questioned" pursuant to Section 455(1). *U.S. v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978). In *Sibla* the court held that if the affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under Section 144. *Sibla* 624 F.2d at p. 868.

The District Court here failed to recuse itself or refer the case to another judge for consideration. Judge Bork, writing for the Court of Appeals, found no fault with the actions of the District Court.

This Court in *Aetna* citing *Murchison*, 349 U.S. 136, 75 S.Ct. 625, asserted that:

The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its highest function in the best way, justice must satisfy the appearance of justice.

As we have seen, the Court of Appeals was sufficiently sensitive to these concerns so that it inquired of counsel whether or not there would be an objection made to participation in the panel of a judge who enjoyed the most minor financial relationship with *The Wall Street Journal* in reference to the proposed publication of a book review. In another case, *Liberty Lobby, Inc. v. John Rees, et al.*, U.S. Court of Appeals for the District of Columbia No. 86-7091, Judge James Buckley inquired of counsel as to whether there would be any objection to his participation in the panel since an issue tangentially could be said to be related to an article published by the *National Review* with which Judge Buckley's brother is associated. Judge Buckley properly declined to participate in the case. In both of these instances the judges themselves made full disclosure in an un-

solicited and gracious manner and made plain their willingness to accept the judgment of counsel regarding an appearance of impartiality. Given this history Judge Bork's intrusion into the cause, insistence upon participating in the case in spite of a motion for disqualification, together with his ongoing close, personal, political and professional relationship with two of the central figures in this case, appears to be an aberration.

In the instant matter, a judge whose conduct in the courtroom and whose reliance upon a document which apparently he examined outside of the courtroom, and who behaved in a dramatically hostile fashion toward Liberty Lobby, Inc. and its counsel and in a dramatically and improperly protective fashion towards Suzanne Garment, refused to recuse himself and refused to refer the question of his disqualification to another judge. Judge Bork, who likely had a closer and more intimate relationship with Mr. and Mrs. Garment then entered the lists as a member of a panel to consider this case although he had not been selected originally on that panel. He denied Liberty Lobby's motion to disqualify him while he had apparently already agreed to serve with both Leonard and Suzanne Garment as a Commentator for the *National Review* and work with Suzanne Garment at another institution. Judge Bork, after finding no reason to question his own participation in the case, quite naturally concluded that the District Court was also correct in its actions. At the very least, neither has the appearance of justice been served nor have doubts about courts' impartiality been resolved.

CONCLUSION

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

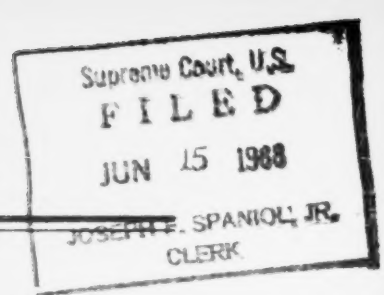
May 5, 1988

Respectfully submitted,

MARK LANE
132 Third Street, S.E.
Washington, D.C. 20003
(202) 547-6700
Attorney for Petitioner

87-2053

No. 88-



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

DOW JONES & CO., INC.
and RICH JAROSLOVSKY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MARK LANE
132 Third Street, S.E.
Washington, D.C. 20003
(202) 547-6700
Attorney for Petitioner

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APPENDIX A

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

ORDER

Upon consideration of Appellant's Motion for Reconsideration of its Application for Disqualification of Judge Bork due to Misconduct of and Deception Practiced by Appellees and Their Counsel and for Sanctions, the opposition thereto and of the reply it is

-2-

ORDERED, by the Court, that
Appellant's Motion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

FILED APRIL 12, 1988

APPENDIX B

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

BEFORE: Wald, Chief Judge; Robinson,
Mikva, Edwards, Ruth B. Ginsburg, Starr,
Silberman, Buckley,* Williams, D.H.
Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's suggestion for rehearing
en banc has been circulated to the full
Court. No member of the Court requested

the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court, en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:

— CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

*Circuit Judge Buckley did not participate in this order.

FILED MAR 18, 1988

APPENDIX C

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

BEFORE: Edwards and Williams, Circuit
Judges

ORDER

Upon consideration of Appellant's
Petition for Rehearing, filed February
19, 1988, it is

ORDERED, by the Court, that the
Petition is denied.

Per Curiam

Constance L. DuPre
CLERK

BY:

Robert Bonner
Deputy Clerk

FILED MAR 18, 1988

APPENDIX D

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

BEFORE: Edwards and Starr, Circuit
Judges

ORDER

Upon consideration of Appellant's
Motion to Reconsider Appellant's Motion
for Disqualification it is

ORDERED, by the Court, that
appellant's motion is denied.

Per Curiam

Constance L. DuPre, Clerk

BY:

Catherine L. Bateman
Deputy Clerk

FILED FEB 25, 1988

APPENDIX E

United States Court of Appeals
For the District of Columbia

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc.,
and Rich Jaroslovsky, Appellees.

APPELLANT'S MOTION TO RECONSIDER
APPELLANT'S APPLICATION FOR
DISQUALIFICATION OF
HONORABLE ROBERT H. BORK PURSUANT TO
TITLE 28 SECTION 455 UNITED STATES CODE

The appellant respectfully requests that the Court recuse Honorable Robert H. Bork from participating in the decision of this cause which was argued on December 8, 1987, in that his impartiality might be reasonably questioned as a result of his close association with two

important figures in this case. On November 23, 1987, prior to the scheduled argument of this case, appellant filed a motion respectfully requesting that Honorable Robert H. Bork recuse himself. On December 7, 1987 this Court denied that application for the reasons set forth in a five page memorandum written by Judge Bork.

A substantial change in circumstance and newly discovered evidence, each made available after the decision of this Court on December 7, 1987, provide the basis for this application for reconsideration. The appellant submits herewith a statement of points and authorities and other documents setting forth in some detail both the change in

-11-

circumstance and the new discovered
evidence in support of this motion.

February 4, 1988

Respectfully submitted,

Mark Lane
132 Third Street, S.E.
Washington, D.C. 20002
(202) 547-6700

Counsel for Appellant

United States Court of Appeals
For the District of Columbia

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc.,
and Rich Jaroslovsky, Appellees.

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF APPELLANT'S MOTION
FOR RECONSIDERATION OF APPELLANT'S
APPLICATION FOR DISQUALIFICATION
OF HONORABLE ROBERT H. BORK
PURSUANT TO TITLE 28 SECTION 455
UNITED STATES CODE

On November 23, 1987 the appellant moved for the disqualification of Honorable Robert H. Bork pursuant to Title 28 Section 455 of the United States Code. In that motion the appellant asserted that a basis for the lawsuit was an article published by appellees and written by Suzanne Garment after consultation

with her husband, Leonard Garment, Esquire. The record reveals that Mrs. Garment suffered from a lack of knowledge regarding legal matters and that although her article was about the impact of the law on public figure defamation cases, she knew nothing about the leading cases in that area and in fact believed that "the Sullivan Doctrine," as she referred to it, might be a treatise on defamation by a professor Sullivan. On the other hand, her husband Leonard Garment, Esquire is a well-known attorney who maintains important contacts with various branches of the United States government, including the judiciary. In support of that contention the appellant submits, as Exhibit A pages 86 and 89 of the January 1988 issue of Regardies magazine which

sets forth in an article entitled "The Power Elite" the "one hundred most influential people in private Washington" according to that business magazine.

It is uncontroverted, based upon the testimony of Suzanne Garment at a deposition in this case, that she wrote the defamatory article and that she had consulted with her husband, Leonard Garment, Esquire, about it. Efforts by Liberty Lobby, Inc. at the deposition of Suzanne Garment, to secure additional information as to the role of Leonard Garment, Esquire in the preparation of the article were unsuccessful since Mrs. Garment, upon the advice and instruction of her counsel, who also served as counsel for Dow Jones & Co., Inc., refused to answer, and pleaded a privilege as a

result of the relationship with her husband.

In the memorandum in support of its motion for disqualification filed with this Court on November 23, 1987, appellant asserted that both Leonard Garment, Esquire and Suzanne Garment held themselves out to be close friends and associates of Judge Bork and were apparently the two most active persons in the United States in support of Judge Bork's nomination to the United States Supreme Court. In that memorandum appellant asserted that Mr. Garment appeared on numerous radio and television programs as the unofficial spokesperson for Judge Bork during that period, released Judge Bork's position to the news media at least on one occasion, ostensibly with Judge Bork's permission,

and in addition, it was widely reported in the press that Suzanne Garment, the author of the defamatory article in this case was also the author, with her husband, of documents widely circulated in support of Judge Bork's nomination to the Supreme Court.

An important aspect of the appeal pending before this Court is the assertion by the appellant that Honorable Thomas Penfield Jackson, the United States District Judge in this case, committed error by refusing to recuse himself as a result of his relationship with Leonard Garment, Esquire.

It appeared to appellant that Judge Bork's impartiality in this matter might be reasonably questioned and that due to actions which have taken place outside the four corners of the courtroom, it

might be asserted that Judge Bork would be more favorably inclined toward the appellees.

The appellees and their counsel, who may possess far greater information about this matter than thus far ascertained by the appellant, declined to take a position regarding the motion to disqualify Judge Bork.

On December 7, 1987, this Court denied the Motion for Disqualification of Judge Bork and published a five page memorandum written by Judge Bork in support of that denial. In that memorandum Judge Bork said "[f]irst, appellant asserts that the Garments were active supporters of my nomination to be an Associate Justice of the United States Supreme Court." (Judge Bork's Memorandum, p. 1) In his memorandum Judge Bork

denied that Mr. Garment's actions were in any way coordinated or endorsed by him and that "many groups and individuals took strong public positions for or against my confirmation." Judge Bork's Memorandum, p. 3) Judge Bork continued "[w]here I to recuse myself every time an individual or group who had supported or opposed my confirmation was connected with a lawsuit, however tangentially, I would, in my opinion, be failing in my judicial duty and be of greatly diminished usefulness to this Court and the litigants it serves."

Judge Bork implied that Leonard Garment was one of many individuals who favored or opposed his confirmation. In addition, his memorandum contemplated his continued service as a member of the

United States Court of Appeals. However, Judge Bork has now resigned from the United States Court of Appeals, subsequent to December 7, 1987, and one of the reasons previously proffered for refusing to disqualify himself in this case has been eliminated by the new circumstances created by his resignation from the Court. In addition, Suzanne Garment, in an article published subsequent to the memorandum of Judge Bork and the decision of this Court to deny the motion disqualifying Judge Bork, has asserted that her husband, Leonard Garment, "was one of the leaders" of a group established "to save the Bork nomination if possible, to save Bork's reputation in any case, and to expose what had been done to him and to the federal judiciary." (Commentary,

January 1988, p. 23) In her impassioned and highly political eleven page article entitled "The War Against Robert H. Bork" Mrs. Garment also asserted that "I myself joined him [Leonard Garment, Esquire] in the effort [to save the nomination of Judge Bork]." (Id.) The relevant page of the Commentary article written by Mrs. Garment is submitted herewith as Exhibit B. On December 14, 1987 the Legal Times, a law journal published in Washington, D.C., devoted part of its front page to this matter. The author of that article reported that Leonard Garment, Esquire stated that he and Judge Bork are in the same poker circle. According to the author of the article, Mr. Garment added that Judge Bork's attendance at the poker games is "spotty." The relevant pages of Legal

Times, p. 1 and p. 12, are submitted herewith as Exhibit C.

While the past relationship of Mr. and Mrs. Garment and Judge Bork are a continuing matter of concern to the appellant, as well as to all those concerned about the fair administration of justice (please see the opinions of contemporary legal scholars on questions of ethics referred to in the Legal Times article, Exhibit C) the future relationship of Judge Bork and Mr. and Mrs. Garment also raises troubling questions. While articles have been published in the press, including the Legal Times (Exhibit C, p. 1) as well as Newsweek, speculating that Judge Bork will join the American Enterprise Institute where Suzanne Garment now serves as a scholar in residence, the appellant

cannot assert that such is the case. The public relations office at American Enterprise Institute, stating that it was acting upon instructions, would only respond "no comment at this time" when asked if Judge Bork was joining that organization. According to the Legal Times, Judge Bork's office also responded "No comment" when asked to respond to the earlier report published in Newsweek. (Exhibit c, p. 2).

However, less reluctant to publish its relationship with Judge Bork was the National Review which, subsequent to the decision of this Court denying Appellant's Motion to Disqualify Judge Bork, announced that beginning in March of 1988, a fortnightly "Commentator" would be published. Among the commentators announced are Leonard Garment,

Suzanne Garment and Robert Bork. Appellant submits herewith the relevant pages of the National Review dated February 19, 1988 as Exhibit D.

In his memorandum, Judge Bork implied that his relationship with Leonard Garment would not render recusal proper even if that relationship were more substantial due to Mr. Garment's "rather tenuous connection with this lawsuit." (Judge Bork's Memorandum p. 4). Judge Bork found that "Leonard Garment's only connection to this action is the fact that his wife may have discussed with him her intention to write a column concerning Liberty Lobby." (Emphasis Added) Actually, when asked if she discussed the proposed column with her husband Mrs. Garment responded "I must have." (Suzanne Garment Deposition,

November 18, 1985, p. 155) Almost immediately thereafter Mr. LoBue, counsel for Mrs. Garment and the defendants, instructed the witness that "there is an interspousal immunity at this point which she can claim." (Id.) The record therefore reveals that Mrs. Garment apparently did discuss the proposed column with her husband before she wrote it and is barren of any further information since the privilege was invoked. Under the circumstances it is difficult to understand how Judge Bork can assert unambiguously, as he did, in his memorandum, that "Leonard Garment's only connection to this action is the fact that his wife may have discussed with him her intention to write a column concerning Liberty Lobby."

Mr. Garment, without doubt, held himself out to be the spokesperson for Judge Bork, not merely one of many persons who took a position on the nomination. It cannot be claimed that the tenuous relationship which Judge Bork found to exist between this case and Leonard Garment also exists between Suzanne Garment, the author of the defamatory article in the case. On October 26, 1987, in an article entitled "Influence, Epilogue on Bork: Leonard Garment's Obsession" Mr. Garment is reported as telling Martin Tolchin of the New York Times that "it was his wife, Suzanne, a political scientist and a former columnist for the Wall Street Journal who involved him in the Bork dispute." That article is submitted herewith as Exhibit E. Mr. Garment

reported that his wife Suzanne "was madder than hell" at aspects of the inquiry into Judge Bork's qualifications. Mr. Garment is quoted as saying of his wife "[s]he got upset, so I got upset, and the more I got into it, the madder I got."

According to the New York Times, the result of the anger felt by Leonard Garment and Suzanne Garment was "a husband and wife operation, with the Garments working together on research, advertisements, petitions, white papers, and news releases."

While Judge Bork, in his memorandum has asserted that "Mr. Garment's actions in support of my nomination were not in any way coordinated with or endorsed by me" and that "Mr. Garment played no role in my preparation for the hearings or in

any of my subsequent activities connected with the confirmation process" Mr. Garment's published view differs sharply. (Judge Bork Memorandum, p. 3)

According to the New York Times Mr. Garment and his son Paul "visited the Borks on the eve of the Judge's scheduled meeting with President Reagan." (Exhibit E). The New York Times report continues:

The city was awash with rumors that Judge Bork would ask that his name be withdrawn.

"Bob said that he was tired, he was weary, he just wanted to get some sleep," Mr. Garment recalled.

"I said, 'You have an obligation. This transcends Robert Bork. You can't walk away from it. They've corrupted the process.'"

"By giving up before it goes to the Senate, you're conceding the basic accuracy of their case," Mr. Garment added.

Judge Bork took the matter under advisement, and announced his decision at a news conference two days later. "I called him and said, 'God bless you,'" Mr. Garment recalled. "I said, 'I'm going to help

you.' He said, "You do whatever you want, but I'm not doing any campaigning."

(New York Times,
October 26, 1987, p. A14)

In summation the New York Times asserted that while Leonard Garment "jumped into the battle unbidden," Garment "consulted frequently with Judge Bork, a long-time friend, who authorized him to issue at least one statement on his behalf." (Exhibit E)

On October 20, 1987 the New York Times reported that Leonard Garment "has been advising Judge Bork." (Exhibit F) Thereafter, Judge Bork wrote to the New York Times stating that Mr. Garment was not his advisor and that he did not coordinate his activities with the Judge. (New York Times, October 22, 1987, Exhibit G) However, Judge Bork also asserted that Leonard Garment "is a

friend of long standing" and that he, Judge Bork, "value[s] his [Garment's] friendship and appreciate[s] his efforts to aid me." (Id.)

Given the public record and the record of this case, the conclusions that Judge Bork's relationship with Leonard Garment even if "more substantial" could not adversely impact upon the motion to disqualify Judge Bork and that Judge Bork's conclusion that his relationship with Leonard Garment fell merely within a wide circle of friendships, appear to be unsound. In view of the public record, it cannot fairly be said that the appellant has failed to show an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge's impartiality. It is that test which this

Court held to be dispositive in U.S. v. Heldt, 668 F.2d 1238 (D.C.Cir. 1981).

In the motion to disqualify filed on November 23, 1987 the appellant asserted that Mr. and Mrs. Garment held themselves out to be close friends and associates of Judge Bork. By implication Judge Bork denied the truthfulness of that assertion in his memorandum.

(Judge Bork's Memorandum, pp. 3-4)

However, in writing to the New York Times Judge Bork stated that Mr. Garment was a friend of long-standing, which appears to place him in a category more akin to being a close personal friend than merely within a wide circle.

The Law

The United States Court of Appeals for the District of Columbia held that

"Section 455 contains a provision calling for disqualification in a 'proceeding in which [a judge's] impartiality might be reasonably questioned,' [and] we join our sister circuits in concluding that a showing of an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under 455." United States v. Heldt, 668 F.2d 1238, 1277 (D.C. Cir. 1981). In support of that contention the Court of Appeals cited United States v. Mirkin, 649 F.2d 78 (1st Cir. 1981); In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th

Cir. 1980), cert denied 449 U.S. 820, 101 S.Ct. 78 (1981); Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980); SCA Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); United States v. Poludniak, No. 80-2133 (8th Cir. Aug. 14, 1981); Wood v. McEwen, 622 F.2d 797, 802 (9th Cir. 1981); United States v. Ritter, 540 F.2d 459 (10th Cir.) cert denied, 429 U.S. 951, 97 S.Ct. 370 (1976).

The District of Columbia Court of Appeals addressed the question of the recusal of the administrative officer who acted in a adjudicative or quasi-judicial capacity in Morrison v. District of Columbia Board of Zoning Adjustment, 422 A.2d 347 (D.C.App. 1980). In Morrison the Court held that it has generally been recognized that the same rules requiring the recusal of

judicial officers are applicable to administrative officers who act in an adjudicative or quasijudicial capacity. In that case, the court ruled:

In the absence of a statute providing otherwise, a judge must recuse himself when his alleged bias arises from outside the "four corners of the court-room," Tynan v. United States, 126 U.S. App. D.C. 206, 210, 376 F.2d 761, 765, cert denied, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111. 1956), and results in "an opinion on the merits on some basis other than what a judge learned from his participation of the case." In re Evans, D.C.App. 411 A.2d 984, 995 (1980), quoting United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

Morrison v. District of Columbia, etc.
422 A.2d 347, 350 (D.C. App. 1980)

In Evans cited above the Court concluded "the appearance of bias on the part of the trial judge necessitates reversal" 411 A.2d at 993, and found

that Rule 63-I [comparable to the sections under which this motion has been brought] "is by its terms mandatory," citing Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 127 U.S.App.D.C. 23, 29, 380 F.2d 570, 576, cert denied, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). The Evans court continued "[i]f an affidavit meets the rule's standards, the judge has a duty to recuse himself. Morse v. Lewis, 54 F.2d 1027, 1031 (4th Cir), cert denied, 286 U.S. 557, 52 S.Ct. 640, 76 L.Ed. 1291 (1932).

CONCLUSION

As a result of the newly discovered evidence and as a result of the changed circumstances, the appellant respectfully requests that Judge Bork be disqualified from further participation in

this case now pending before this Court. Further, while the appellant has secured more than adequate information, it believes, from the public record regarding the relationships which imperil the fair administration of justice in this case, it appears probable that additional information should be secured. No party and no lawyer for a party, unless devoid of reason and concerns for self-preservation, eagerly challenges the qualifications and impartiality of a trial judge or an appellate justice or, as in this instance, both the trial court and a member of this Court. The best interests of a fair and independent judiciary and bar, however, are served when such a challenge, required by a commitment to fairness, is made. Cowardice, if

demonstrated by a party or counsel, in such a matter, generally adversely impacts upon the right of the public to fair consideration of contested matters. In this instance, specifically, it might well defeat the appellate process since Judge Bork, having established controversial standards as to his own qualifications to be impartial might tend to apply those same or similar standards to the challenge presented by the appeal regarding the partiality of Judge Jackson.

The holding by this Court in Heldt that the "appearance" of bias or prejudice is all that is required to demonstrate the propriety of recusal is sound, as these proceedings have revealed. No party and no lawyer, after

having demonstrated the clear appearance of bias, should be placed in the uncomfortable position of being constrained to investigate the details of the circumstances already brought to the attention of the court in summary form and to compile evidence which might impact upon the credibility of statements made.

Judge Bork enjoyed a working relationship with Mr. Garment, both Mr. Garment and Mrs. Garment were the two most active and public participants in the effort to win the nomination to the United States Supreme Court for Judge Bork, Mr. Garment was a leader in that effort, Mr. Garment and Judge Bork apparently still play poker together, Mr. Garment, Mrs. Garment and Judge Bork are Commentators for the National Review and Judge Bork and Mrs. Garment may soon

be working together at the American Enterprise Institute. Judge Bork has publicly described Leonard Garment as a friend of long standing and Mrs. Garment, the author of the offending article, persuaded her husband to lead the campaign for Judge Bork. At the very least the record reveals that there is an appearance that Judge Bork may be less than impartial in this matter, especially in so sensitive a question as to whether or not Judge Jackson should have recused himself.

The refusal of counsel for Dow Jones & Co, Inc. to take a position on this matter raises additional ethical considerations. If Mr. LoBue, counsel for Dow Jones & Co., Inc. and Suzanne Garment, is in possession of information which demonstrates that there is no

close relationship, professional or personal, between Judge Bork and Mrs. Garment or between Judge Bork and Mr. Garment, ordinarily one would suspect that he would feel constrained to respond in that fashion to the motion to disqualify. If he is aware of facts which should lead to disqualification he is, the appellant believes, ethically bound to disclose those facts, or at the very least, to join in the motion.

If as Regardies asserts, Judge Bork "benefitted tremendously in the public eye from Garment's media blitzkrieg" (Exhibit A) and if Sen. Orrin Hatch was perceptive in concluding "[i]f I were in similar straits as Bob Bork, I'd give my eye teeth to have a friend like Leonard Garment" (Exhibit E) then Judge Bork has reason to feel indebted to Leonard

Garment and Mrs. Garment since, according to Mr. Garment, it was his wife, Suzanne, who involved her husband in the crusade to save Judge Bork's nomination and reputation (Exhibits E and B).

Surely it cannot be denied that an average, responsible citizen could examine this record and conclude that there is at least the appearance that Judge Bork should be disqualified from considering this case. No party, as a matter of right, is entitled to have a friend in court; each party is entitled to an impartial hearing. It is this basic approach, after all, that lies at the heart of our concept of due process.

For the foregoing reasons the appellant respectfully requests that this Court appoint a special master empowered to conduct depositions so that the full

record may be revealed and the parties to this lawsuit and the Court, as well as the public, be assured that there is no impediment to the impartial administration of the law in this matter.

February 4, 1988

Respectfully submitted,

Mark Lane
132 Third Street, S.E.
Washington, D.C. 20002
(202) 547-6700

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Appellant's Motion for Reconsideration of Appellant's Motion for Disqualification of Honorable Robert H. Bork and Statement of Points and Authorities in support thereof were mailed, first class, postage prepaid to Robert P. LoBue, Esquire, Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, New York 10112 on this 5th day of February, 1988.

Mark Lane

RECEIVED
FEB 5, 1988

CLERK OF THE UNITED
STATES COURT OF APPEALS

EXHIBIT A

LEONARD GARMENT

Partner

DICKSTEIN SHAPIRO &

MORIN

These days Garment is Washington's premier power lawyer. When the mistakes or misdeeds of the high-and-mighty are splashed across the front page of the Washington Post, he's the guy they're most likely to call to get them out of trouble. Business has never been better.

There are keener legal minds and better courtroom thespians than Garment, but few lawyers understand the workings of Washington as well as he does. His access to the highest reaches of power-- from the press and the judiciary to

Capitol Hill and the White House--may be second to none. And if he hasn't already joined the ranks of such lawyer-legends as Clark Clifford, Robert Strauss [see entry], and Edward Bennett Williams [see entry], he's on the verge. Garment's reputation, the American Lawyer recently said, is "edging toward the Olympian."

Garment's genius for media manipulation--he's a master craftsman of "spin control," the fine art of making the press and the public see things your way--makes him one of Washington's top legal guns-for-hire. He attracts clients who want more than verdicts of innocence; to remain in or return to their high-level positions, they need to win back a measure of their former stature and respect. And when it comes

to lawyering in the court of public opinion, Garment is in a class by himself. "If you qualify for becoming Len's client," says Robert McFarlane, President Reagan's former national security adviser, "you have a lot going for you already.

McFarlane, Charles Wick, Edwin Meese, Fiat Corporation, Toshiba Corporation--these are some of the powerful people and companies that have turned to Garment in times of need. In McFarlane's case, Garment parceled out exclusive tidbits of confession and apology to a ravenous media, which portrayed McFarlane as a sympathetic figure. Recently he launched a similar strategy on behalf of Toshiba, which is in trouble for its part in the sale of

banned submarine technology to the Soviets.

Last year Robert Bork went down for the count despite Garment's well-publicized presence in his corner. Bork, however, benefited tremendously in the public eye from Garment's media blitzkrieg. After Garment began to use the press to skewer the opposition, Bork seemed to gain some undefinable moral advantage.

An hour of Garment's time will run you \$250. If that sounds steep, just consider what a crooked accountant could do to your portfolio while you're in Allenwood.

REGARDIE'S

January 1988

EXHIBIT B

The War Against Robert H. Bork

by

Suzanne Garment

Thus pro-Bork and anti-Bork politicians worked together at the end to hustle the Bork debate off the public stage as quickly as possible. Well they might. The war against Robert Bork showed the modern American Left at its ugliest, and the response by pro-Bork forces showed the Right at its most impotent.

To defeat Bork, the Left spent a huge amount of money--\$10 to \$15 million--on a negative political campaign of a size wholly unprecedented in the history of American judicial selection.

They could not have mounted such a Herculean effort had they not hated Bork with a special venom. And indeed they did hate and fear him intensely, because of the special role he had come to play as a conservative in this country's intellectual politics.

President Reagan was saying kiss-of-death style, that it was up to Bork to decide whether or not he wanted to withdraw.

On Friday, October 9, Bork went to the White House--to withdraw, the press was certain. But then came one of the few unplanned moments of the whole affair. Bork asked the President whether he would get support from the White House if he stayed in the fight. The President, promising what he could not deliver, said yes. On the basis of

Reagan's answer Bork walked in the White House press room and said he was staying. For once, the journalists gathered in the press room were truly surprised by something that happened there.

During the period between that day and the final vote on October 23, a group consisting largely of attorneys, acting from a combination of admiration for Bork and anger at the nature of the campaign against him, launched a last-ditch effort. They had several goals in mind: to save the Bork nomination if possible, to save Bork's reputation in any case, and to expose what had been done to him and to the federal judiciary. Leonard Garment, a Washington lawyer, was one of the leaders (and I myself joined him in the effort).

SUZANNE GARMENT, a resident scholar at the American Enterprise Institute, is writing a book about the politics of scandal in Washington. Her article, "Can the Media Be Reformed?," appeared in our August 1987 issue.

COMMENTARY

January, 1988

EXHIBIT C

Friendship (and Foes) Present

Recusal Quandry for Bork

By Kenneth Karpay

Leonard Garment's staunch defense of Judge Robert Bork's failed Supreme Court nomination is raising an ethical dilemma now that Bork has returned--for the time being, at least--to the U.S. Court of Appeals for the D.C. Circuit.

Bork sits on a panel of judges that is reviewing an appeal by the far right Liberty Lobby in a libel case that indirectly pits the group against Garment's wife, Suzanne Garment. Ms. Garment is a former associate editor and columnist for The Wall Street Journal.

The Liberty Lobby's lawyer--author and D.C. solo practitioner Mark Lane--moved for Bork to recuse himself from the matter. Lane says he objected to Bork's role in the case because of what he assumed was Bork's close relationship with the Garments.

"He was presented in the media as the spokesman for the judge," says Lane, who is perhaps best known as a proponent of the theory that President Kennedy's assassination was part of a conspiracy.

The friendship between Leonard Garment, of D.C.'s Dickstein, Shapiro & Morin, and Bork goes back long before Garment's recent high-profile advocacy of Bork's nomination. They served together in the administration of Richard Nixon and occasionally play in the same poker game.

But last week, Bork issued a five-page memorandum in which he rejects Lane's motion for disqualification. Removing himself from the Liberty Lobby case, Bork said, is "unwarranted."

Bork also took the unusual step of addressing possible future recusal requests arising out of his contentious Supreme Court confirmation battle. He said he would be unlikely to remove himself from cases involving litigants or attorneys who played a role in the nomination debate.

Bork and fellow Circuit Judges Harry Edwards and Stephen Williams heard oral arguments Dec. 8 in the libel case, Liberty Lobby v. Dow Jones & Co. (No. 86-7017). The group sued Dow Jones, the parent company of The Wall Street Journal, over an October 1985 column by

Suzanne Garment about an unrelated Liberty Lobby libel suit against The National Review.

On the surface, it may appear surprising that Bork would not recuse himself from the matter, particularly in light of the fact that Suzanne Garment actively joined her husband in his pro-Bork campaign, writing advertising copy and editing memorandums presented to senators.

Moreover Bork is rumored to be on the verge of leaving the Circuit to join the American Enterprise Institute for Public Policy Research (AEI), a conservative think tank where Suzanne Garment now serves as a scholar in residence.

But Bork argues that he has a firm basis for rejecting Lane's recusal

motion, although ethics expert are not so sure.

In his memorandum, Bork maintains that the ABA Canons of Judicial Ethics does not require recusal in the case. Bork relies on a 1970 advisory opinion by an ABA ethics committee that distinguishes between an acquaintance involved in a case before the judge who is "a very close friend and almost part of the family" versus one who is "merely within the wide circle of a judge's friendships."

Writes Bork: "I have no difficulty in finding that my friendship with the Garments falls into the latter category."

Bork also says that Leonard Garment has no real stake in the lawsuit, and he notes that Ms. Garment has not been personally named as a defendant.

"Given the attenuated nature of Mr. Garment's connection with this lawsuit, and my purely social acquaintance with both the Garments, I am confident in my ability to render an impartial judgement," Bork maintains.

While Bork easily resolves the question, legal and judicial ethics experts are troubled.

"In my view, he's wrong," says Stephen Gillers, professor of Law at the New York University School of Law.

"Bork should realize, that to the public, the close connection between himself and Garment is clear--Garment was the single most important lobbyist on Bork's behalf."

But other ethics professors say that the case may be more difficult than both Bork and Gillers acknowledge.

"First I'm bothered by the fact that Judge Bork cites the outmoded Canons of Judicial Ethics, not the Code of Judicial Conduct for U.S. Judges," says Robert Aronson, professor of law at the University of Washington School of Law in Seattle. Applying the new Code, which Congress enacted into federal law in the mid-1970s, Aronson says, "I think it's a very close call."

Aronson, the author of a new law school casebook on legal ethics, argues that Bork should have considered two tests before he ruled on the motion: First, whether Bork himself believes he could be impartial in the case, and second, whether Bork's impartiality might be questioned by a reasonably objective person.

Aronson says the facts of the case-- especially the Garments' relationship with Bork--are not totally clear. "My own preference, in really close cases [like this one], is for judges to recuse themselves," concludes Aronson.

Another ethics professor, Charles Wolfram of Cornell Law School, says the Garment matter presents "a close call."

If I were a confidant of Judge Bork's, I would have suggested [that] another judge sit on the case," says Wolfram, "But he does have a duty to sit that can't be forgotten."

Adds Wolfram: "I'm a little mystified by the role of Leonard Garment. He spoke initially as if he was Bork's lawyer and then seemed later to back off a little.

Shedding Garment

Just before the full Senate voted to reject Bork in October, Bork wrote a letter to the New York Times saying Garment was neither his adviser nor his spokesman.

Bork's memorandum last week reiterates that point.

"Mr. Garment's actions in support of my nomination were not in any way coordinated with or endorsed by me." Bork writes. "Mr. Garment played no role in my preparation for the hearings or in any of my subsequent activities connected with the confirmation process."

Bork calls "untrue" the contention that Mr. Garment "was my spokesperson or agent, officially or unofficially."

The Garments agree with Bork's description of their relationship with

the judge. "He is not a close friend under the ABA's definition," says Ms. Garment, who worked at the Journal for 10 years before joining the AEI about 10 months ago.

Mr. Garment says that while he and Bork are in the same poker circle, Bork's attendance at games is spotty.

"I would say that in the last seven years, I've seen him at a dinner party of 12 people or more, less than two or three times." Mr. Garment says. "I've never had lunch with him alone."

And although the Garments engaged in a well-publicized and unprecedented lobbying campaign on Bork's behalf, Mr. Garment insists that he did his lobbying without suggestions or directions from Bork.

"I did it all on my own. I didn't clear things with him," Garment says.

For his part, Lane, counsel for the Liberty Lobby, says he will not challenge Bork's recusal decision. "The judge says they're not close friends, so I accept that," Lane says.

Dow Jones' counsel, Robert LoBue of New York's Patterson, Belknap, Webb & Tyler, would not comment on the recusal matter, except to note that his side took no position on the issue.

Perhaps anticipating other recusal motions stemming from his confirmation ordeal, Bork last week hinted that he would not be inclined to step aside.

"Many groups and individuals took strong public positions for or against my confirmation," Bork acknowledges.

"Were I to recuse myself every time an individual or group who had supported or opposed my confirmation was connected with a lawsuit, however tangentially, I would, in my opinion, be failing in my judicial duty and be of greatly diminished usefulness to this court," Bork adds.

At least one prominent litigator and former Bork opponent, Alan Morrison of Public Citizen Litigation Group, says Bork's position is understandable.

In August, Morrison's group issued a detailed and highly publicized report concluding that Bork typically votes against consumers, environmental groups, and workers, and in favor of business and the government. Earlier this month, the group was before the entire circuit, including Bork, in an en banc argument

in a novel Freedom of Information Act case.

Morrison says his organization did not ask Bork to recuse himself from the case. "There wasn't a legally sufficient basis for it," contends Morrison, a position that many legal experts say is correct.

And Morrison adds he will not try to remove Bork from other case argued by his organization.

"Can you imagine what the rule could be? You'd oppose a nominee in order to get him off of your cases!" Morrison asserts. "Sure, I'd oppose all of the Reagan nominees and get them off of all of my cases. That would be the definition of chutzpah."

Meanwhile, the speculation has been mounting that Bork would soon resign

from the bench. "No comment" was his office's response to a report by Newsweek that Bork would soon join the AEI.

But an unidentified spokeswoman at the AEI suggests that an announcement about Bork could come in mid-to-late December.

A spokeswoman in Bork's office acknowledges that Bork has still not hired clerks for the 1988-89 term, a sign that he may already have decided to leave the circuit.

LEGAL TIMES

December 14, 1987

EXHIBIT D

Memo to: Our Readers

From: WFB

At the latest meeting of the editors, we decided on two innovative features.

The first, beginning next month, introduces a fortnightly "Commentator."

We are pleased to announce our list of Commentators. They include Robert Bork, Leonard Garment, Suzanne Garment.

National Review

February 19, 1988

EXHIBIT E

Epilogue on Bork:

Leonard Garment's Obsession

Washington, Oct. 25--Near midnight last Thursday, Leonard Garment was in a telephone booth in the deserted Capitol. He had just learned that Senate Republican leaders had abandoned efforts to stave off the defeat of the Supreme Court nomination of Judge Robert H. Bork. Mr. Garment was on the phone to a reporter when a Capitol policeman told him the building was closed.

For three weeks, he had waged a lonely passionate fight for a nomination universally considered doomed. He had confronted not merely the Senate opponents of Judge Bork, but also many in

the White House, Justice Department and Senate Republican leadership who wanted to end the agony and move on to the next Supreme Court nominee. But Mr. Garment felt strongly that the candidate had been victimized by a campaign of politicization and distortion, and should not capitulate.

"This is the worst thing I've ever seen in 20 years in Washington, from the standpoint of misconduct, distortion and deceitfulness" Mr. Garment said of the campaign to defeat Mr. Bork's nomination.

For weeks the 63-year-old Washington lawyer had been working like a man possessed, marshaling support for what he privately called Project Lazarus, after the Biblical character raised from the dead. Mr. Garment immersed himself in

the Bork debate, writing briefs, circulating petitions, paying for advertisements and appearing on television shows.

Blitzing the Senate

On the opening day of Senate debate, he was all over Capitol Hill. He was outside the Senate chamber lobbying senators and their aids, inside press galleries lobbying the reporters, and working the telephones in the Vice President's Senate office, which he converted into a command post in behalf of the nominee.

He jumped into the battle unbidden, but consulted frequently with Judge Bork, a longtime friend, who authorized him to issue at least one statement on his behalf.

Many Senate Republicans were not amused. "Some of them just want to get it over with," said Senator Orrin Hatch, Republican of Utah, an unabashed fan of Mr. Garment. "If I were in similar straits as Bob Bork, I'd give my eye teeth to have a friend like Leonard Garment."

However, Judge Bork has disassociated himself somewhat from Mr. Garment's actions. "Mr. Garment is a friend of long standing, but he is not my adviser," the Judge said in a letter published Thursday in The New York Times. "Nor is he, as reported elsewhere, my lawyer or spokesman. I value his friendship and appreciate his efforts to aid me, but his activities are not coordinated with me, and he is in no sense my agent."

Mr. Garment is no stranger to controversy. The Brooklyn-born son of immigrant parents and a former law partner of Richard M. Nixon, he came to Washington as President Nixon's special consultant and, later, counsel. A free-wheeling, clarinet-playing intellectual, he was among the embattled moderates in the Nixon White House.

Since his return to private practice, he has made a fortune in legal fees from corporate clients, and has represented individuals he considered victims of persecution. He has exploited his extensive contacts in the media as well as his own gift for the quotable phrase.

A Passion for Causes

Mr. Garment becomes passionately involved in his causes and clients. And

not all of his work for individuals has been for free. The lawyer charged \$250 an hour for his successful defense of Attorney General Edwin Meese 3d, who was cleared of charges that he violated Federal ethics laws.

Just last May, Mr. Garment sat beside Robert C. McFarlane, former national security adviser, his client in the Iran-Contra hearings. After Mr. McFarlane's attempted suicide, Mr. Garment persuaded his client to grant interviews to a few journalists, to gain sympathy and re-establish his credibility.

As Mr. Garment tells it, it was his wife Suzanne, a political scientist and a former columnist for The Wall Street Journal, who involved him in the Bork dispute. As a scholar who had written

on antitrust laws, one of Judge Bork's areas of expertise, she had come to respect the judge's intellect and courage, Mr. Garment recalled. She said that she became incensed when she saw him subject to what she viewed as vilification during the confirmation process.

Family Affair

"She was madder than hell," Mr. Garment recalled. "She said, 'they're destroying intellectual freedom, freedom to think and to write. She got upset, so I got upset, and the more I got into it, the madder I got.'"

The result was a husband and wife operation, with the Garments working together on research, advertisements, petitions, white papers, and news releases.

Mr. Garment had known Judge Bork casually as a member of a poker group, a poor player who kept a written list of the relative superiority of winning hands--straights, flushes, full houses. Other players included Chief Justice William H. Rehnquist, and Antonin Scalia, the newly appointed Associate Justice.

"Three weeks ago, I started to call around to find out who was doing what" in behalf of Judge Bork, Mr. Garment said. To his dismay, he said, he discovered that the White House, the Justice Department and some Senate Republicans had given up the fight.

Two weeks ago, amid rumors that Judge Bork would ask that his nomination be withdrawn, Mr. Garment obtained the nominee's permission to deny the rumors

on his behalf. "I said to Bob, 'It's terribly important to stanch the hemorrhaging,'" Mr. Garment recalled.

The same day, he and his wife drafted a full-page advertisement that ran in The Washington Post under the headline, "This Time They've Gone Too Far." The lawyer paid \$35,000 for the ad.

'You Have an Obligation'

The next week, Mr. Garment appeared on the "Today Show," "Nightline," and various local news shows attacking Judge Bork's attackers, saying that they had distorted the nominee's views and record. In midweek, Mr. Garment and his son Paul visited the Borks on the eve of the judge's scheduled meeting with President Reagan. The city was awash

with rumors that Judge Bork would ask that his name be withdrawn.

"Bob said that he was tired, he was weary, he just wanted to get some sleep," Mr. Garment recalled.

"I said, 'You have an obligation. This transcends Robert Bork. You can't walk away from it. They've corrupted the process.'"

"By giving up before it goes to the Senate, you're conceding the basic accuracy of their case," Mr. Garment added.

Judge Bork took the matter under advisement, and announced his decision at a news conference two days later. "I called him and said, 'God bless you,' Mr. Garment recalled. "I said, 'I'm going to help you.' He said, "You do

whatever you want, but I'm not doing any campaigning."

Eight days ago, at the judicial conference in Hershey, Pa., the Garments wrote and circulated a petition denouncing the politicization of the Bork debate. It was signed by 23 Federal judges from New York. During the week he worked with 15 volunteer lawyers to produce 10 briefs attacking sections of the Judiciary Committee report.

Day of Rejection

On Thursday, Mr. Garment met personal rejection on Capitol Hill. He was barred from the Senate press gallery, at the request of several reporters who complained that he was a nuisance. Then the Senate Republican leadership barred him from the use of the Vice President's room, just off the Senate floor.

On Thursday evening, Mr. Garment was last to learn that Judge Bork had finally decided to abandon the fight. Mr. Garment said that Judge Bork had told him that he could not take another week of it, Mr. Garment said. It is, perhaps, a sign of how obsessed Mr. Garment had become with the fight that at that point he still thought that if the vote were delayed, he could have provided data that would have altered the outcome. But he said he understood Judge Bork's position.

When the senators stood up to be counted on Friday, 58 of them voted against the judge. The battle was over.

NEW YORK TIMES

October 26, 1987

EXHIBIT F

Inquiries Begun on Warning
to Pro-Bork Witness

By Martin Tolchin

Washington, Oct. 19--Leonard Garment, a Washington lawyer who has been advising Judge Bork, said: "The Judiciary Committee cannot investigate itself. It's the ultimate conflict of interest."

NEW YORK TIMES

October 20, 1987

EXHIBIT G

Friend, Not Advisor

To the Editor:

An Oct. 20 news story [on inquiries into possible harassment of Senate Judiciary Committee witnesses] identifies Leonard Garment as "a Washington lawyer who has been advising me. Mr. Garment is a friend of long standing, but he is not my adviser. Nor is he, as reported elsewhere, my lawyer or spokesman. I value his friendship and appreciate his effort to aid me, but his activities are not coordinated with me, and he is in no sense my agent.

ROBERT BORK
Washington, Oct. 20, 1987

NEW YORK TIMES
October 22, 1987

APPENDIX F

Notice: This opinion is subject to formal revision before publication in the Federal Register or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant
v.
Dow Jones & Company, Inc., et al.

Appeal from the United States
District Court for the
District of Columbia
(Civil Action No. 84-03455)

Argued December 8, 1987
Decided February 5, 1988

Mark Lane for appellant.

Robert P. LoBue for appellees.

Before: EDWARDS, BORK AND WILLIAMS,
Circuit Judges.

Opinion for the Court filed by Circuit
Judge Bork.

Bills of costs must be filed within 14
days after entry of judgment. The court
looks with disfavor upon motions to file
bills of costs out of time.

BORK, Circuit Judge: This is a
libel action in which Liberty Lobby,
Inc., a citizens' group, seeks fifty
million dollars in compensatory and
punitive damages from the publisher of
The Wall Street Journal. After more
than a year of discovery, the district
court granted defendants' motion for
summary judgment on the first count, and
judgment on the pleadings as to the
remaining four counts of Liberty Lobby's
complaint. We affirm the district
court's disposition of the case in all

respects, although we sometimes follow a different route to the same result.

I.

On September 28, 1984, The Wall Street Journal published a column entitled "Controversial Publisher--Racial Purist Uses Reagan Plug." Appendix to Complaint, E.N. 1 (filed November 15, 1984) [hereinafter "Complaint"];¹ Wall St. J., Sept. 28, 1984, at 56, col. 1. The article, written by defendant Rich Jaroslovsky, a ten-year veteran of The Journal's news staff, bore the logo "Politics 84," and was published as part

¹Neither party to this appeal has prepared an appendix, an omission that has caused unnecessary work for the court. We will cite record documents by their Entry Number ("E.N.") on the district court docket sheet and their date of filing with that court. Where a record document is also available in a published source, we will cite that source as well.

of The Journal's coverage of the 1984 presidential campaign. The article is reprinted in its entirety as Appendix A to this opinion. The article states that one Roger Pearson, an advocate of racial betterment through genetic selection, had received a letter of commendation from President Reagan and that he had exploited the letter to promote his controversial publications. According to the story, the letter was composed by a Pearson associate on the White House staff, and President Reagan had never met Mr. Pearson. Jaroslovsky concluded that the incident demonstrated "how a highly ideological presidency--conservative or liberal--can be used by well-connected outside activities to gain respectability."

In the course of discussing Pearson's past activities and associations, the article asserted:

Other Pearson writings appeared in Western Destiny, a magazine published by the far right, anti-Semitic Liberty Lobby. Mr. Pearson edited Western Destiny briefly in the mid-1960s and wrote several books on race and eugenics that were issued by Liberty Lobby's publishing arm. These pamphlets are still sold by the National Socialist White People's Party, the Arlington, Va. based American Nazi group; Mr. Pearson says he doesn't have any connection with that group.

App.A, infra, p. 35.

On November 15, 1984, Liberty Lobby filed a complaint for libel in the United States District Court for the District of Columbia, basing jurisdiction on diversity of citizenship under 28 U.S.C. § 1332 (1982). Complaint ¶ 1. Named as defendants were Dow Jones & Co., Inc., the company that publishes

The Journal, and Rich Jaroslovsky, the author of the Pearson article. Id. ¶¶ 2-3.

Liberty Lobby claims that the quoted passage is false and defamatory in two respects. First, although Liberty Lobby admits to being an anti-Zionist organization, it claims that The Journal's characterization of it as "anti-Semitic" is false and injurious to its reputation. Complaint ¶ 10. Second, Liberty Lobby contends that it never published the magazine, Western Destiny; nor did it issue any books by Mr. Pearson. Id. It further contends that no books or pamphlets issued by Liberty Lobby are or were sold by the National Socialist White People's Party. Id.

In November, 1985, after eleven months of voluminous discovery had been

completed, Liberty Lobby sought and was granted leave to amend its complaint to add four additional causes of action for libel against Dow Jones. See Motion for Leave to Amend and Supplement the Complaint, E.N. 46 (filed Nov. 1, 1985). These claims were based upon a column entitled "There's Nothing Like a Libel Trial for an Education" which appeared in the editorial section of The Wall Street Journal on October 11, 1985. Id. exh. B; Wall St. J., Oct. 11, 1985, at 28, col. 3. The column was written by Ms. Suzanne Garment, a member of The Journal's editorial staff, and is reprinted in its entirety as Appendix B to this opinion.

Using as a vehicle the trial of another libel action, one between Liberty Lobby and The National Review, a

magazine of opinion, the column gave the author's views "about libel suits in general and their place in democratic politics." In introducing its theme, the Garment column noted that Liberty Lobby's claim based on the Jaroslovsky article was at that time pending before the district court, stating:

Over the years, Liberty Lobby and Mr. Carto have sued a number of publishers that called them racist and anti-Semitic. Still pending is a Liberty Lobby suit against The Wall Street Journal, which last year called Liberty Lobby "anti-Semitic" and reported that it had published various tracts by a promoter of racial betterment through genetic selection.

App. B, infra, at 37. This republication of allegedly defamatory material from the Jaroslovsky story forms the basis for Liberty Lobby's second cause of action.

The body of the Garment column discussed Liberty Lobby's trial strategy in defending a counterclaim for libel brought against it by The National Review. The column described in detail the courtroom scene prior to the delivery of opening arguments to the jury. It noted the presence of a "good-looking black female lawyer" at Liberty Lobby's counsel table with Mr. Lane, the lead counsel, and went on to state, "[t]he moment the jury filed in--all black, as is not uncommon in the District--you began to suspect that Mr. Lane might have something in mind." The column then summarized Liberty Lobby's opening argument to the jury, at one point quoting Mr. Lane as saying:

If you read the words of Adolf Hitler regarding superior races and advanced races and inferior races, you will have difficulty separating

the words of Mr. Buckley in his editorials in the National Review from the words of Adolf Hitler.

App. B, infra, at 38. The column summed up its discussion of Liberty Lobby's trial strategy by stating:

So we see the Liberty Lobby standing up in court, and calling Mr. Buckley racist, most likely calculating that blacks jurors will be too hypnotized by this possibility to consider other facts important. This is not just an ordinary lawyer's trick. This is breathtaking in its daring. Most of us would be embarrassed to appeal to a racial or religious minority audience so crudely. We know the Fair Play Patrol would at once swoop down and cart us away. But the Carto team is of sterner stuff, able to put its head down and go for broke.

Id. at 39.

The column questioned the utility of highly inflammatory libel suits in a democratic society, and compared "Louis Farrakhan wowing them at Madison Square Garden" to "Mark Lane in front of the jury." The statements in the Garment

column concerning Liberty Lobby's conduct during The National Review trial form the basis for its third, fourth and fifth causes of action for libel against Dow Jones.

On December 16, 1985, appellees filed a motion for summary judgment on the first cause of action based on the Jaroslovsky article, and for judgment on the pleadings as to the four claims based on the Garment column. Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment and Judgment on the Pleadings, E.N. 57 (filed Dec. 1985).

On July 10, 1986, the district court issued its memorandum opinion and order, granting appellees' motions and dismissing Liberty Lobby's complaint with prejudice. See Liberty Lobby, Inc. v.

Dow Jones & Co., 638 F.Supp. 1149 (D.D.C. 1986). The district court found that the truth or falsity of The Journal's statements concerning Liberty Lobby's publishing activities was "immaterial," for, even if false, they were not "defamatory in the least of Liberty Lobby but for the ... characterization of the entire conglomerate as 'anti-Semitic'" Id. at 1152. On the latter score, the district court "suspect[ed] ... that the term 'anti-Semitic,' as Jaroslovsky has used it, is probably constitutionally protected opinion." Id. (citing Ollman v. Evans, 750 F.2d 970, 974-84 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985)). However, the district court went on to hold that, to the extent the charge of

anti-Semitism had any objectively verifiable factual content, the statement was substantially true. Id. Relying upon the contents of a multi-volume file Liberty Lobby kept on publication about Jews² and upon the views expounded in Liberty Lobby's official organ, The Spotlight, the district court found that appellees' "evidence of Liberty Lobby's institutional anti-Semitism in its most malign sense" was "compelling." Id. With only the bald denial of the affidavit of Willis Carto, Liberty Lobby's founder and chief executive officer, weighing against appellees' evidence,

²On appeal, Liberty Lobby vigorously attacks the characterization of its research file on the Jewish religion as anti-Semitic. See Brief of Liberty Lobby at 18-20. Given our disposition of Liberty Lobby's claims based upon the allegation of anti-Semitism, see infra pp. 19-21, we need not address the issue.

the district court concluded that no reasonable jury could find by a preponderance of the evidence that the ascription of anti-Semitism to Liberty Lobby was false. Id. at 1153.

The district court also found that dismissal of Liberty Lobby's claims based on the Jaroslovsky article was mandated by the complete lack of evidence that any of the allegedly defamatory statements were published with actual malice. The court noted that Jaroslovsky had spent three months on intermittent research, had reviewed a large number of Liberty Lobby documents, and had consulted various articles about Liberty Lobby. Jaroslovsky had shown these materials to his editor, who concurred in his judgment that Liberty Lobby was anti-Semitic. The Journal's

Washington bureau chief, who was familiar with Liberty Lobby's radio program and its official publication, The Spotlight, agreed. The district court concluded that no reasonable jury could find that The Journal had acted with knowledge of falsity or reckless disregard of the truth, "there being no evidence of [actual malice] at all, much less proof that is clear and convincing." Liberty Lobby, 638 F. Supp. at 1153.

Turning to the Garment column's reference to the Jaroslovsky article, the district court found that this claim was "extinguished by the demise of Count I." Liberty Lobby, 638 F. Supp. at 1153. In the alternative, the court held that the "republishing" was

shielded by the common law privilege accorded to fair and accurate accounts of official reports and records. Id.

The remainder of the Garment column was, in the district court's view, "simply descriptions of Garment's personal reactions to Liberty Lobby's attorneys opening statement, nothing more." Liberty Lobby, 638 F. Supp. at 1154. Even assuming Liberty Lobby's charges of bias or vindictiveness were true, Garment's comments on The National Review trial were, in the lower court's view, expressions of opinion entitled to absolute first amendment protection. Id.

Under Fed. R. Civ. P. 56(c), summary judgment

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law.

The motion requires the court to look behind the bare allegations of the pleadings to determine if they have sufficient factual support to warrant their consideration at trial. The Supreme Court recently reaffirmed these principles:

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). See First Nat'l Bank of Ariz. v. Cities Serves. Co., 391 U.S. 253, 289 (1968); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (1983). The party

opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial."

Fed. R. Civ. P. 56(c).

Where a public figure, which Liberty Lobby concedes that it is, or a public official pursues a libel action, first amendment requirements supplant both the common law of defamation and the normal standards of appellate review in several respects. First, such a plaintiff must demonstrate by at least a fair preponderance of the evidence that the allegedly defamatory statement is false.

See Philadelphia Newspapers, Inc. v. Heeps, 475 U.S. 767, 775-78 (1986); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418

U.S. 264, 284 (1974) ("Before the test of recklessness or knowing falsity can be met, there must be a false statement of fact."); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("[A] public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false.").

This requirement is fully applicable at the summary judgment stage. Thus, where a district court concludes upon motion or its own initiative (after proper notice) that no reasonable jury could find by a fair preponderance of the evidence that the statement complained of is false, summary judgment for the defendant should be granted. Where the question of truth or falsity is a close one, a court should err on

the side of nonactionability. See
Hepps, 475 U.S. at 776.

Second, a public figure or official must demonstrate by clear and convincing evidence that the defendant published the defamatory falsehood with "actual malice," that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 280 (1964). To support a libel judgment, there must be evidence which establishes in convincing fashion "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Through the defendant's own actions or statements, the dubious nature of his sources, the inherent improbability of the story or

other circumstantial evidence, the plaintiff must demonstrate that the defendant himself entertained a "high degree of awareness of ... probable falsity." Garrison, 379 U.S. at 74. This requirement, too, is applicable when considering a motion for summary judgment. The question for the court is "whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." Anderson v. Liberty Lobby, 106, S. Ct. 2505, 2515 (1986).

Finally, statements of opinion or belief are nonactionable as a matter of law. See Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 504 (1984) ("Under our Constitution 'there is no such thing as a false idea. However pernicious an opinion may seem, we

depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 332, 339-40 (1974)). The absolute protection accorded statements of opinion stems, in part, from plaintiff's burden of proving falsity, a component of which is proving that a statement is amendable to disproof. But as the language of Gertz suggests, the rule has independent roots in the limitations which the first amendment places on the intrusion of any branch of government, including Article III courts, into the marketplace of ideas.

First amendment concerns also affect a court's posture in reviewing the evidence presented on summary judgment. Normally, the evidence presented upon a

motion for summary judgment is construed in favor of the party opposing the motion. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (1983).

As to the nonconstitutional issues in a libel action, this standard still obtains. However, where the constitutional prerequisites of falsity and actual malice are at issue "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose, 466 U.S. at 499 (quoting New York Times, 376 U.S. at 284-86).

While Bose and prior cases involved appellate review of trial verdicts in

libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment. See Herbert v. Lando, 781 F.2d 298, 308 (2d Cir.) (applying Bose independent review to summary judgment for media defendant), cert. denied, 106 S. Ct. 2916 (1986); accord Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 894-98 (5th Cir. 1985), cert. denied, 106 S. Ct. 1635 (1986); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984).

We turn to an analysis of the statements at issue and the district court's rulings.

A.

Unlike the district court, we think Jaroslovsky's statements concerning

Liberty Lobby's publishing activities have defamatory content independent of the charge of anti-Semitism. Under District of Columbia law,³ a statement is defamatory, "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." Howard Univ. v. Best, 484 A.2d 958, 988 (D.C. 1984) (citation omitted). "It is only when the court can say that the publication is not reasonably capable of any

³All parties to this diversity suit agree that the common law of the District of Columbia governs this action. Liberty Lobby, a Washington-based advocacy group, alleges substantial circulation of the allegedly defamatory material in the District. See Complaint ¶ 2. See also Dowd v. Calabrese, 589 F. Supp. 1206, 1210 (D.D.C 1984) (Under District of Columbia conflict of law principles, law to be applied in defamation action is not that of forum where offending publication was prepared, but place where the plaintiff suffered the most significant harm to reputation.).

defamatory meaning and cannot reasonably be understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." Levy v. American Mut. Ins. Co., 196 A.2d 475, 476 (D.C. 1964). See Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 n.10 (D.C. Cir. 1966) (citations omitted).

Here, The Journal article by Jaroslovsky indicated that Liberty Lobby had published Pearson's theories of racial supremacy and genetic selection, and that these publications were sold by an American Nazi organization. A jury could find that such an allegation, standing alone, tended "to lower [Liberty Lobby] in the estimation of the community or to deter third persons from dealing or associating with [Liberty

Lobby] in the estimation of the community or to deter third persons from dealing or associating with [Liberty Lobby]." Restatement (Second) of Torts § 559 (1977); see also id. illustration 2 (An allegation of membership in the Ku Klux Klan is defamatory.). We have little doubt that a District of Columbia court would find that the allegation of this type of publishing activity has sufficient defamatory content to go to a jury. See Afro-American Publishing, 366 F.2d at 655 (charge that plaintiff store owner cancelled his subscription to black magazine for racist motives and made derogatory statements about black customers could support libel verdict).

We find, however, that these statements about Liberty Lobby's publishing

activities are nonactionable as a matter of federal constitutional law for two reasons. First, we are convinced that no reasonable jury could find by a fair preponderance of the evidence that these statements are false. Second, even if a jury could find that the Jaroslovsky article falsely exaggerated the connection between Liberty Lobby and Pearson's writings, there is absolutely no evidence that the statements were made with "a high degree of awareness of ... probable falsity." Garrison, 379 U.S. at 74.

1.

It is undisputed that both Western Destiny and the Pearson books mentioned in the Jaroslovsky article were published by an unincorporated entity located in Torrance, California, doing

business as The Noontide Press. See Affidavit of Robert P. LoBue, E.N. 57, ¶ 85 (filed Dec. 16, 1985) [hereinafter "LoBue Aff."].⁴ The record evidence that both Mr. Carto and Liberty Lobby exercise substantial financial and editorial control over the publishing activities of Noontide is, in our view, compelling.

In their first set of interrogatories, appellees asked Liberty Lobby to:

state whether plaintiff or any of its officers or directors or their spouses controls or ever has controlled, in whole or in part, directly or indirectly, formally or informally, any aspect of the business or publishing activities or

⁴ Mr. Robert LoBue is counsel of record for Dow Jones in this action. His affidavit, filed in support of appellees' motion for summary judgment, was used as a vehicle to summarize and organize the documentary material upon which appellees relied below.

operations or the editorial policy or decision-making of The Noontide Press.

Defendants' First Set of Interrogatories to Plaintiff, E.N. 6, at 13 (filed Dec. 26, 1984). In an answer sworn to by Mr. Carto, the appellant responded in the affirmative and went on to indicate that Mr. Carto had acted in an "advisory capacity" to Noontide for the last twenty years. Plaintiff's Answer to Defendants' First Set of Interrogatories, E.N. 9, at 17 (filed Feb 28, 1985). In deposition testimony, Mr. Carto admitted that he was the central figure in the establishment of Noontide Press and had chosen its name. Deposition of Willis A. Carto, E.N. 41, at 400-01 (filed Oct. 4, 1985) [hereinafter "Carto Dep."]. Noontide's nominal director, Mr. Thomas Marcellus, testi-

fied that Mr. Carto exercises considerable control over the selection of the books that Noontide will publish. See LoBue Aff. ¶ 62 (quoting Deposition of Thomas Marcellus at 116). In support of their dispositive motion, appellees also introduced the sworn testimony of Mr. Robert M. Bartell, a member of Liberty Lobby's Board of Policy until 1984. See LoBue Aff. ¶ 60. In this testimony, given in an unrelated action involving Liberty Lobby, Mr. Bartell described Noontide's publishing activities as follows:

a pamphlet or a book of some kind was run through Liberty Lobby's executive staff for reading, for approval, for changes, for whatever.... And the finished copy is then given back to Mr. Carto and it goes back to California and is published by Noontide Press, and this has been going on for years and years and years, then [Mr. Carto]

doesn't have to say that I am Noontide Press although we all know he is.

Id. (quoting Deposition of Robert M. Bartell at 46-47, filed in Mermelstein v. Institute for Historical Review, No. C 356 542 (Cal. Super. Ct.)).⁵

⁵Both Noontide Press and the Institute for Historical Review ("IHR") are trade names for an incorporated entity known as The Legion for the Survival of Freedom, Inc. ("The Legion"). In Mermelstein, the plaintiffs brought suit against Liberty Lobby, The Legion, Noontide, the IHR and Mr. Carto, among others. The suit was based upon the IHR's offer of a \$50,000 reward to anyone who could prove that the Holocaust had actually occurred. The offer received extensive publicity in Liberty Lobby's publications. See LoBue Aff. ¶¶ 218, 220. The Mermelstein plaintiffs evidently submitted such proof and claimed the reward. Upon the IHR's refusal to honor its offer, the plaintiffs instituted an action for breach of contract and intentional infliction of emotional distress. See LoBue Aff., exh. 14 (transcript of proceedings in Mermelstein v. Institute for Historical Review, No. C 356 542 (July 22, 1985)). The case was settled with the defendants, including Liberty Lobby,

Until a fire in 1984, Liberty Lobby and The Noontide Press shared office space in Torrance, California. See Carto Dep. at 474. During the 1960's, when the Pearson books were published, Mr. Carto was a board member of The Legion, the incorporated entity behind Noontide Press. See Carto Dep. at 300-03. Mr. Bruce Hollman, a Liberty Lobby director, also sat on The Legion's board at the time of the publications at issue. See id. at 301. At the same time, Mr. Robert Kuttner, listed as a contributing editor of Western Destiny, was also a member of Liberty Lobby's Board of Directors. Id. at 120. During

(footnote continued from preceding page)

agreeing to publish a formal apology and to pay the plaintiffs \$150,000 in damages. See LoBue Aff., exh. 14, at 4-13.

this time, Roger Pearson was the editor of Western Destiny, and Mr. Carto, under the pseudonym "E.L. Anderson," as its sole associate editor. See Plaintiff's Answer to Defendants' First Set of Interrogatories, E.N. 9, at 15 (filed Feb 28, 1985) (admitting that "E.L. Anderson" is a pseudonym for Mr. Carto).

The Legion's application to do business as Noontide Press is signed by Mrs. Elizabeth Carto, Mr. Carto's wife, and a supervisor at Liberty Lobby. See LoBue Aff. ¶46 (citing Deposition of Thomas Marcellus, exh. 15). The application also lists Bruce Hollman as one of Noontide's principals, himself a Liberty Lobby director. Id. Mr. Carto has personally chosen the only two directors of Noontide, and they received their

positions by contacting Liberty Lobby through The Spotlight. LoBue Aff. ¶¶ 52-54. The record also indicates that The Noontide Press advertises only in Liberty Lobby's official organ, The Spotlight. LoBue Aff. ¶ 76 (citing Marcellus Deposition at 69-70). In return, Liberty Lobby purchases almost half of the books for its "Liberty Library" from Noontide. See LoBue Aff., exh. 17. Appellees have also adduced evidence that Liberty Lobby provides substantial financial support to The Legion and Noontide. See LoBue Aff. ¶ 77.

Upon this record, we have little difficulty in concluding that both The Journal's characterization of Noontide as Liberty Lobby's "publishing arm" and

its statement that Liberty Lobby "published" Western Destiny are substantially true.⁶ Given the substantial ties between Mr. Carto, Liberty Lobby and Noontide, we are convinced that Liberty Lobby could not demonstrate by a fair preponderance of the evidence that these statements are false.

In Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.) (en banc), cert. denied, 108 S. Ct. 200 (1987), The Washington Post ran a story charging that the President of Mobile Oil Corp., William Tavoulareas, had "set up" his son Peter in a

⁶Other news organizations have apparently reached this conclusion as well. In reporting on the activities of The Legion, The Los Angeles Times referred to "the publishing arm of the Carto operations known as Noontide Press." Carto Dep., exh. 88; The Los Angeles Times, May 3, 1981, at 12, col. 1.

shipping company which did substantial business with Mobil. Both father and son sued in libel, claiming that the "set-up" allegation was false and defamatory. In fact, Atlas Shipping, the company Peter Travoulareas was associated with, dealt only with Samarco, a Saudi/Mobil joint venture. 817 F.2d at 767-68. The Travoulareases claimed that the article created the false and defamatory impression that that there was a "direct link" between Mobil and Atlas. Id. at 787.

Reviewing the record, this court found that Mobil's and the elder Tavoulareas' links with Atlas were substantial and palpable, although in no way formalized. Mobil had recruited the first head of Atlas Shipping, had provided it with ships and office space,

and had even supplied it with an interim manager when its most senior executive departed. Tavoulareas, 817 F2d at 787. Under these circumstances, the court held that "even if The Post article failed to make clear the formal, corporate relationship between Mobil, Samarco, and Atlas ... the defendants cannot in reason and in law be held liable for accurately reporting the direct link that undisputably did exist between Mobil and Atlas." Id.

We think the logic of Tavoulareas is controlling here. Newspaper reporters should not be required to convert the results of investigative journalism into a Standard & Poor's report on the formalities of corporate structure. The sting of the charge that Liberty Lobby

has approved of and assisted in the dissemination of Mr. Pearson's controversial views and the Western Destiny magazine, is substantially true. See Restatement (Second) of Torts § 581A, comment f (1977) ("It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). Moreover, there is evidence in this record that Mr. Carto specifically designed the Liberty Lobby/Legion/Noontide/IHR network so as to divorce Liberty Lobby's name from those of its less reputable affiliates. See infra p. 18. It is Mr. Carto's right to pour his political activities into whatever corporate shell he desires. What he may not do is silence

those who see through the form to the reality.

2.

Even if a reasonable jury could find that Jaroslovsky and his editors falsely exaggerated Liberty Lobby's role in the dissemination of the Pearson books and Western Destiny, no jury could find that they did so with knowledge of falsity or reckless disregard for truth. After over a year of discovery, Liberty Lobby has not been able to adduce a scintilla of evidence indicating that anyone involved in the preparation of the Pearson article entertained any doubt about its veracity.

To the contrary, appellees' evidence reveals that Jaroslovsky thoroughly documented his story and relied upon wholly reputable sources in drawing the

connection between Liberty Lobby and Noontide's publishing activities. Among Jaroslovsky's sources was a June 1980 issue of the Facts newsletter published by the Anti-Defamation League of B'nai B'rith ("ADL"). See Deposition of Richard Jaroslovsky, E.N. 32 & 33, exh. 45 (filed Aug. 6, 1985) [hereinafter "Jaroslovsky Dep."]. The Anti-defamation League of B'nai B'rith, "The Spotlight: Liberty Lobby's Voice of Hate," Facts, vol. 26, No. 1 (June, 1980). Under the subtitle "Front for Anti-Semitism," the article states:

For almost a quarter century, Liberty Lobby has served as a front for Carto's seamier operations and activities. Among these have been ... Western Destiny, a magazine that published racist, Nazi-tinged articles extolling the Nordic mystique; and Noontide Press, publisher of anti-Semitic, racist, and pro-Nazi books....

Id. at 1. Later, the article refers to Noontide as "a Carto-influenced from"
Id. at 4. Other ADL publications which Jaroslovsky reviewed in preparing the Pearson story referred to the "Carto Network" and described Noontide and Western Destiny as "Carto-run" and "official partners" in the Liberty Lobby conglomerate. See Jaroslovsky Dep., exh. 57; The Anti-Defamation League of B'nai B'rith, Extremism on the Right--A Handbook 25 (1983).

Jaroslovsky also relied upon an article by C.H. Simonds, entitled "The Strange Story of Willis Carto," which appeared in the september 10, 1971 issue of The National Review. Jaroslovsky Dep., exh. 60; Simonds, "The Strange Story of Willis Carto," The National Review, Sept. 10, 1971, at 983 The

article flatly states that "[t]he sole owner and proprietor of Noontide is Willis Carto." Id. at 981. The article chronicles Mr. Carto's attempts to distance himself and Liberty Lobby from The Legion/Noontide network but concludes that "[t]he most casual observer soon detects a tight relationship among the various components of Carto's empire. The same names keep popping up on this letterhead, that masthead or board; it's a closed group, and only very rarely will the name of an outsider appear." Id. at 985.

During the composition of the story Jaroslovsky also possessed a copy of the masthead of Western Destiny, listing "E.L. Anderson," a known Carto pseudonym, as the sole associate editor. See Jaroslovsky Dep., exhs. 48 & 49. He

also had obtained an advertisement published in Western Destiny, listing two Pearson books as available from Noontide Press. Jaroslovsky Dep., exh. 56.

Finally, Jaroslovsky had a clipping from the Nazi publication, White Power, which advertised two of the Pearson works published by Noontide. See Jaroslovsky Dep., exh. 54.

We think The Wall Street Journal's good faith reliance on previously published reports in reputable sources of Liberty Lobby's connections with Noontide and Western Destiny precludes a finding of actual malice as a matter of law. See Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 862 (5th Cir. 1978) ("The subjective awareness of probable falsity required by [St. Amant] cannot be found where, as here, the

publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied.").

B.

We turn next to the charge of anti-Semitism, leveled against Liberty Lobby in the Jaroslovsky article and reported as the subject of a lawsuit in the Garment column. The district court suggested that the term "anti-Semitic" as used by Jaroslovsky is probably a constitutionally protected statement of opinion. The court went on to say that if "anti-Semitism" were regarded as an "objectively verifiable fact," it was amply proved against Liberty Lobby in this case. We are unwilling to say that the term has no core meaning so that it is an expression of opinion in any

context, and, as such, always constitutionally protected. Like many words, the term "anti-Semitic" has both descriptive and normative content. Compare, for example, the use of "fascist" as a generic epithet, see Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), with its use in such a statement as "He was a close companion of Mussolini and a Fascist." We tend to agree with the district court that if the term "anti-Semitic" has a core, factual meaning, then the truth of the description was proved here.⁷

⁷Since its inception, Liberty Lobby has been an outspoken, often vicious, critic of Jewish groups and leaders, and of the United States' domestic and foreign policy in regard to Jewish issues. In a letter to subscribers to The Spotlight, Liberty Lobby characterized "political Zionism" as "the most ruthless, wealthy powerful and

We rest our decision, however, on the fact that Liberty Lobby has adduced no evidence tending to show the charge of anti-Semitism was made with the requisite actual malice. In preparing

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evil political force in the history of the Western world." Carto Dep., exh. 4; Letter from Willis A. Carto to subscribers of The Spotlight at 5 (Jan. 2, 1985). The Spotlight has given extensive publicity to the fantastic claim that the Holocaust, the extermination of 6,000,000 Jews by Nazi Germany, never occurred. See LoBue Aff. ¶¶ 124, 154, 162, 190. A sampling of articles from The Spotlight, reveals titles such as: "Senator Commits Political Suicide by Assailing Power of Israeli Lobby"; "Jews' Favorite Candidate Slipping"; "Israel Dictates U.S. Policy"; "ADL Plans Massive Brainwashing"; "Was There Really a Holocaust?" and "Free Hess Sentiment Growing." See id. ¶¶ 151-224. In all its public pronouncements, Liberty Lobby has consistently maintained the position that American Jewry exerts a disproportionate influence over all American institutions to the detriment of what Liberty Lobby believes are America's true interests. See id. ¶¶ 156-60.

his story, Jaroslovsky relied upon various ADL publications, the Simonds article in The National Review, as well as the statements of the former general counsel of Liberty Lobby which were published in The Washington Star. See Jaroslovsky Dep., exh. 45 (ADL publication in the Facts series referring to Carto as "a long-time anti-Semite" and Liberty Lobby as "a front for Anti-Semitism."); id., exh. 64 (Washington Star report of statement of Mr. Warren Richardson, ex-General Counsel of Liberty Lobby, "condemn[ing] unequivocally the anti-Jewish, racist actions of the Liberty Lobby and some of their officers and employees.").

The Journal's reliance on these and other reputable sources would preclude any finding of actual malice as a matter

of law. See supra p. 19. In Liberty Lobby v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984), rev'd on other grounds 106 S. Ct. 2505 (1986), Liberty Lobby and Mr. Carto used the journalist Jack Anderson and others for referring to Mr. Carto as " the leading anti-Semite in the country" and characterizing Liberty Lobby as "anti-Semitic." Id. In preparing their story, Mr. Anderson's reporters had relied upon various published accounts of Liberty Lobby's activities, including the ADL publications and The National Review article relied upon by Jaroslovsky here. Even applying the less stringent preponderance of the evidence test, this court held that reliance on these sources precluded a jury from finding actual malice. Id. Liberty Lobby was well aware of its

status as a public figure from the outset of this litigation. Moreover, this court's decision in the Anderson case was issued two weeks before Liberty Lobby filed its complaint in this action. Yet, after a year of discovery Liberty Lobby has produced no evidence to indicate that Jaroslovsky or his editors had any reason to doubt the same sources relied upon in Anderson. The district court's entry of summary judgment for appellees was clearly warranted on this ground alone.

C.

Count three of Liberty Lobby's amended complaint seeks to attach liability to the Garment column's repetition of the charge of anti-semitism and the publishing statements in referring

to this lawsuit. Our prior determination that the publishing statements are substantially true would seem to preclude liability for their repetition. It is conceivable that liability could attach to the Garment column's repetition of the charge of anti-Semitism if it could be shown that the statement was false and was repeated with knowledge of falsity or reckless disregard of truth. However, we think the Garment column's discussion of a pending lawsuit is privileged as a fair and accurate description of a judicial proceeding under both the common law of the District of Columbia and the Constitution.

The Garment column states, "[s]till pending is a Liberty Lobby suit against The Wall Street Journal, which last year called Liberty Lobby 'anti-Semitic' and

reported that it had published various tracts by a promoter of racial betterment through genetic selection."

App. B, infra, p. 37. The common law of libel has long held that one who republishes a defamatory statement "adopts" it as his own, and is liable in equal measure to the original defamer. See Dameron v. Washington Magazine, Inc., 779 F.2d 736, 739 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986); see also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 799 (5th ed. 1984) ("Every repetition of the defamation is a publication in itself, even though the repeater states the source ... or makes clear that he himself does not believe the imputation.") (footnotes omitted).

To ameliorate the chilling effect that the republication rule would have on the reporting of controversial matters of public interest, common law courts, including those of the District of Columbia, recognize a privilege for fair and accurate accounts of governmental proceedings. See Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 88-90 (D.C. 1980), cert. denied, 451 U.S. 989 (1981). Following the Restatement, the District of Columbia common law abandons the concept of "adoption" where a report of an official proceeding is "(a) accurate and complete, or a fair abridgment of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern." Phillips, 424 A.2d at 88

(quoting Restatement (Second) of Torts § 611 (1977)).

Federal constitutional concerns are implicated as well when common law liability is asserted against a defendant for an accurate account of judicial proceedings. In Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975), the father of a deceased rape victim brought suit for common law invasion of privacy against a television station which mentioned his minor daughter's name in conjunction with its report on the trial of those charged with the crime. The station's reporter had obtained the victim's name by attending the trial and inspecting the indictments in the case. Id. at 470. The Georgia Supreme Court rejected the television station's first amendment

defense, holding that the father was entitled to take his claim to a jury.

The Supreme Court reversed, noting that, "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Cox, 420 U.S. at 492. See also Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a courtroom is public property.... Those who see and hear what transpired can report it with impunity."). The Supreme Court held that Mr. Cohn's suit was barred as a matter of law, stating, "the First and Fourteenth Amendments command nothing less

than that the states may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."

Cox, 420 U.S. at 495. See also Time, Inc. v. Firestone, 425 U.S. 448, 457 (1976) ("The public interest in accurate reports of judicial proceedings is substantially protected by Cox....").

The Garment column's report on this lawsuit is privileged both under the common law and the Supreme Court's decision in Cox. It fairly and accurately describes the substance of this action, in the context of a broader discussion of libel suits in general, clearly a matter of public concern. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829 839 (1978) ("The

operations of the courts and the judicial conduct of judges are matters of utmost public concern."). Indeed, since libel suits are government proceedings which by definition involve material that is allegedly false and defamatory, no meaningful discussion of such suits would be possible unless such reports were privileged. The district court's dismissal of this count on the pleadings was clearly appropriate.

D.

The Garment column's discussion of The National Review trial is similarly protected. To the extent that it constitutes a factual report on Liberty Lobby's opening argument in The National Review trial, the Garment column is privileged as an accurate report of a government proceeding. See supra pp.

22-24. It is undisputed that Ms. Garment attended the opening day of the trial and used the official transcript of that proceeding in the preparation of her column. Where the column quotes or summarizes Mr. Lane's opening argument, comparison with the official transcript reveals that it does so with complete accuracy. Mr. Lane did indeed "explain[] how The National Review had tried to bring down great black men" and he did compare the writings of Mr. Buckley to the words of Adolf Hitler. See LoBue Aff., exh. 71 (Transcript of Proceedings in Liberty Lobby v. National Review, Inc., No. 79-3445, at 150-82).⁸

⁸On a motion for judgment on the pleadings, the district court was entitled to take judicial notice of the record in The National Review case to determine that the Garment column's summary of those proceedings was fair

No extended analysis is necessary to conclude that the remainder of the Garment column is constitutionally protected opinion under Ollman. The column appeared on the editorial page of The Journal, and is shot through with the language of personal opinion. The column characterizes Mr. Lane's argument as "crude," "ugly," "pernicious" and "breathtaking in its daring." These are clearly statements of opinion dependent upon personal perspective: what is crude and ugly appeal to some, may be forthright and vigorous advocacy to others. See Greenbelt Coop. Publishing

(footnote continued from preceding page.)

and accurate. See Shuttleworth v. City of Birmingham, 394 U.S. 147, 157 (1969); Dixon v. Jacobs, 427 F.2d 589, 596 (D.C. Cir. 1970) ("It is clear to us that the district court was entitled to take judicial notice of its own records.")

Ass's v. Bressler, 398 U.S. 6, 14 (1970) (characterization of real estate developer's vigorous negotiation strategy at town meeting as blackmail" held constitutionally protected opinion).

Statements of this type are simply not amenable to disproof. Whether or not Mr. Lane in front of a jury "generates a distinct shiver" is a subjective impression, and as such inherently unverifiable. See Franklin & Bussell, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 869 (1984) ("[E]valuative statements of taste and belief can never provide the basis for a defamation suit because such statements are incapable of being proved false.").

On appeal, Liberty Lobby contends that several alleged factual errors in

the Garment column strip it of the constitutional protection otherwise accorded to statements of opinion. See Brief of Liberty Lobby at 29-33. Appellant argues that the "black lawyer" placed at its counsel table by the Garment column, although a law school graduate, was not a member of the bar. Id. at 33. It further contends that The National Review exercised its preemptory challenges to assure an all black jury at trial because it intended to put on favorable testimony from black witnesses. Id. Thus, the Garment column's "implication" that Liberty Lobby chose a black lawyer and a black jury to further its trial strategy is, in Liberty Lobby's view, false. Relying on the concurring opinion of one judge in the original panel disposition of the Ollman

case, see Ollman v. Evans, 713 F.2d 838, 848-49 (D.C. Cir.) (Robinson, C.J., concurring). vacated and reh'g en banc granted, 713 F.2d 838 (1983), Liberty Lobby argues that the Garment column's failure to fully and accurately disclose the underlying facts of The National Review trial precludes it from claiming the status of protected opinion. See Brief of Liberty Lobby at 28.

As both a legal and factual matter, Liberty Lobby's argument is utterly devoid of merit. First, the opinion upon which Liberty Lobby relies was vacated and became a dissenting position held by only one judge in the final disposition of the Ollman case. See Ollman, 750 F.2d at 1016 (Robinson, J., dissenting). Appellant's characterization of this position as the holding of

this court is preposterous. The majority of the court read Gertz "to provide absolute immunity from defamation actions for all opinions." Ollman, 750 F.2d at 974. While the stated facts underlying an opinion may support a libel action if they are themselves false and defamatory, an opinion itself never can.

Second, the alleged inaccuracies here are either minor in the extreme or nonexistent. That the black woman at Liberty Lobby's counsel table was a law school graduate but not a member of the bar is immaterial. Referring to her as a lawyer is not of itself defamatory, and is, in any event, substantially true. Moreover, the Garment column does not state that Liberty Lobby selected an all black jury. The article stated that

an all black jury "is not uncommon in the District"; it did not implicitly or explicitly attribute the composition of the jury to either party. The district court was clearly correct in holding that the bulk of the Garment column is constitutionally protected under Ollman. Since opinions are nonactionable as a matter of law, dismissal on the pleadings of counts three, four, and five of Liberty Lobby's amended complaint was appropriate.

III.

On appeal, Liberty Lobby raises several issues collateral to the merits of its libel action. First, appellant asserts that the district court judge erred in failing to recuse himself after counsel for Liberty Lobby made two oral motions for his disqualification. See

Brief of Liberty Lobby at 9-12. These motions were based upon the district court's decision not to allow Liberty Lobby to further depose Ms. Garment.

Id. at 9-10. Second, Liberty Lobby asks us to pass on a third written motion for the recusal of the district court judge. Id. at 10. This motion was filed after the district court granted appellees' dispositive motion, and has not been passed upon by the district court judge. Finally, Liberty Lobby claims that the district court's discovery rulings precluded it from developing evidence of actual malice on the part of Ms. Garment, and prevented it from discovering who actually authored the Garment column's reference to the Jaroslovsky article. Id. at

12-18. These claims need detain us only briefly.

The only ruling of the district court on the question of disqualification was in response to an oral motion by appellant's counsel apparently based on the district court judge's decision to deny appellants' second motion to compel further testimony from Ms. Garment. See Transcript of Proceedings taken on Feb. 27, 1986, E.N. 83 (filed Mar. 6, 1986). The motion was based entirely upon the trial judge's rulings from the bench on discovery issues. It is well settled that a motion for recusal under 28 U.S.C. § 144 or § 455 (1982), must be based upon prejudice from an extra-judicial source. See United States v. Heldt, 668 F.2d 1238, 1272 & n.71 (D.C. Cir. 1981), cert.

denied, 456 U.S. 926 (1982). As we stated in United States v. Haldeman, 559 F.2d 31, 133 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977), "[t]he attitude for which section 144 mandates recusal is not indicated by prior judicial rulings, or in-court comments prompted by developments in the case or prior legal proceedings, or the exercise of related judicial functions." (footnote ommitted). Since Liberty Lobby's two in-court motions were based entirely upon the district court's discovery rulings in this case, their denial was clearly proper.

Appellant's written motion for recusal was filed over two months after the district court issued its ruling on the merits and some six weeks after appellant filed its notice of appeal in

this court. See Plaintiff's Motion for Disqualification. E.N. 110 (filed Sept. 25, 1986). The district court presently has before it this recusal motion and a motion for sanctions filed by appellees. See Motion of Defendants for Sanctions, E.N. 96 (filed July 28, 1986). Pursuant to Liberty Lobby's request, the district court has stayed all action on defendants' request for sanctions pending disposition of this appeal. See Order Staying Proceedings, E.N. 111 (filed Sept. 24, 1986).

Under these circumstances, we do not think that appellant's written motion for recusal of the district court judge is properly before us at this time. Recusal is a highly personal decision. The judge must assess the truth of the facts alleged and determine if they

would impeach his impartiality or appearance of impartiality. See Heldt, 668 F.2d at 1271-72. This is not a decision that an appellate panel may make for a district court judge in the first instance. A motion for recusal based upon the appearance of impropriety can have only prospective effect. See United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). Orders entered prior to the recusal motion are unaffected by its disposition, absent a showing of actual bias. See Murphy, 768 F.2d at 1539 ("Our research has not turned up any case involving mere appearance of impropriety in which the court has set aside decisions that had been taken by the district judge before any party asked for recusal."). Accord Mims v.

Shapp, 541 F.2d 415, 417 (3d Cir. 1976). Thus, appellant's motion can in no way affect the district court's judgment in this action or our holding on appeal. It is for the district court judge to decide as an initial matter whether he will rule on appellee's motion for sanctions or step aside in favor of another judge.

Liberty Lobby also argues that the district court erred in refusing to compel further deposition testimony by Ms. Garment. Specifically, appellant alleges that it was improperly denied additional discovery which would have uncovered evidence of Ms. Garment's actual malice in publishing her account of The National Review trial. The short answer to this contention is that evidence of actual malice is irrelevant to

the issues upon which the district court granted appellees' motion for judgment on the pleadings. The district court held that the defamatory portions of the Garment column were constitutionally protected opinion. See Liberty Lobby, Inc. v. Dow Jones & Co., 638 F. Supp. 1149, 1154 (D.D.C. 1986). We have affirmed that ruling on appeal. See supra pp. 25-27. Opinions are nonactionable as a matter of law. See supra p.26. Indeed, the concepts of knowledge of falsity or reckless disregard of truth cannot even sensibly be applied to an expression of personal belief.

Moreover, the record reveals that the appellant deposed Ms. Garment for some fifteen hours over the course of three days. See Deposition of Suzanne R. Garment, E.N. 87, 88 & 89

(filed Mar. 12, 1986) [hereinafter "Garment Dep."]. Much of the questioning wandered extremely far afield. Ms. Garment was asked about her views on the "suffering of the Palestinian people," the massacres at Sabra and Shatila, and a host of other political subjects not shown to be even tangentially relevant to this action. See Garment Dep. at 553-649. Under these circumstances, the district court clearly did not abuse its discretion in cutting off further discovery.

Appellant also contends that the district court's discovery rulings prevented it from establishing who exactly was the author of the Garment column's reference to this action. See Brief of Liberty Lobby at 21-26. Because the identity of the author was

thus "concealed" from it, appellant was denied the opportunity to establish actual malice on the author's part. Id. at 21.

This contention is wholly devoid of merit. First, we have held that the Garment column's reference to this action is absolutely privileged as an accurate report of a judicial proceeding. The mental state of its author is irrelevant to this issue. Second, the record reveals that this portion of the Garment column was revised by Mr. Melloan, an editor at The Journal, in consultation with libel counsel. See Garment Dep. at 357-60. The trial court's refusal to allow further inquiry in this area had nothing to do with authorship. Rather the court held that

discussions between Mr. Melloan and Dow Jones' counsel were protected by the attorney-client privilege. See Transcript of Proceedings taken on Feb. 27, 1986, E.N. 83, at 8-10 (filed Mar. 6, 1986).

In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court held that communications between corporate counsel and a corporation's employees made for the purpose of rendering legal advice are protected by the attorney-client privilege. Such discussions are shielded from discovery in order to assure "full and frank legal advice to the employees who will put into effect the client corporation's policy." Id. at 392. Pre-publication discussions between libel counsel and editors or

reporters would seem to come squarely with the scope of the privilege as defined in Upjohn. See Dowd v. Calabrese, 589 F. Supp. 1206, 1215 n.37 (D.D.C 1984) (discussions between editor and libel counsel protected by attorney-client privilege); Davis v. Costa-Gavras, 580, F. Supp. 1082, 1098-99 (S.D.N.Y. 1984) (discussion with attorney at pre-release libel review of film held protected by attorney-client privilege). The basis for the privilege was adequately established in the record and the appellant has made no showing that facts known to Dow Jones' libel counsel could not be ascertained from other witnesses. Under these circumstances, the district court's ruling will be affirmed.

IV.

This suit epitomizes one of the most troubling aspects of modern libel litigation: the use of the libel complaint as a weapon to harass.⁹ Despite the

⁹Liberty Lobby has brought a number of libel suits against media defendants that have characterized it as racially prejudiced or anti-Semitic. See, e.g., *Dall v. Pearson*, 246 F. Supp. 812 (D.D.C. 1963), aff'd, C.A. No. 18, 414 (D.C. Cir. Oct. 22, 1964), cert. denied, 380 U.S. 965 (1965) (libel suit based on columnist's statements that Liberty Lobby's congressional testimony was an "anti-Semitic diatribe" and "an attack on the Jews"); *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201 (D.D.C. 1983), aff'd in part, rev'd in part, 746 F.2d 1563 (D.C. Cir. 1984) rev'd in part, 106 S. Ct. 2505 (1986) (libel suit based upon magazine's statements that Liberty Lobby was "anti-Semitic" and "infiltrated by Nazis"); *Liberty Lobby, Inc. v. National Review, Inc.*, No. 79-3445, (D.C. Apr. 20, 1982) (libel action based on The National Review's characterization of Liberty Lobby as "a hotbed of anti-Semitism"); *Liberty Lobby, Inc. v. Kees*, No. 84-3452, (D.D.C. April. 20, 1982) (libel action based on characterization of

patent insufficiency of a number of appellant's claims, it has managed to embroil a media defendant in over three years of costly and contentious litigation. The message to this defendant and the press at large is clear: discussion of Liberty Lobby is expensive. However well-documented a story, however unimpeachable a reporter's source, he or she will have to think twice about publishing where litigation, even to a successful motion for summary judgment, can be very expensive if not crippling.

(footnote continued from preceding page)

Liberty Lobby as racist and anti-Semitic); *Carto v. Buckley*, 649 F. Supp. 502 (S.D.N.Y. 1986) (libel action based on charge that the "distinctive feature" of Liberty Lobby publication, The Spotlight, is "racial and religious bigotry"). None of these suits has been successful and in no instance has Liberty Lobby been allowed to present its claims to a jury.

We have conducted an independent review of the record in this case, and have found that each of appellant's claims is clearly barred on several common law and constitutional grounds. The district court's judgment dismissing all of Liberty Lobby's claims with prejudice is

Affirmed.

Appendix A

Controversial Publisher

RACIAL PURIST USES REAGAN PUB

By Rich Jaroslovsky

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON--Roger Pearson, a publisher of politically conservative academic journals here, has something other publishers would envy: a glowing letter of praise from Ronald Reagan.

Plenty of well-known conservatives have written for Mr. Pearson's publications, but his kudos from the most famous conservative of all stands out. Mr. Pearson has used reproductions of the 1982 Reagan letter--praising "your substantial contributions to promoting and upholding those ideas and principles we value at home and abroad"--in bulk

mailings to solicit sales and subscriptions.

Those who have received copies of the presidential letter might be surprised to learn that Mr. Pearson, a British-born anthropologist, has spent much of his career advancing the theory that the "purity" of the white race is endangered by "inferior" genetic stock. He has warned that people of European descent may be "annihilated as a species" unless they act to preserve their "racial identity," and he currently receives funds from a controversial foundation dedicated to "racial betterment."

The 57-year-old Mr. Pearson even draws harsh attacks from other elements of the hard right, members of which fear he may discredit their goals. He

resigned from the World Anti-Communist League, a federation he once headed, after some of its chapters charged that he encouraged the membership of European and Latin American groups with Nazi or neo-Nazi ties. Former Maj. Gen. John Singlaub, who now heads the league's U.S. affiliate, calls Mr. Pearson an "embarrassment" who is "not at all welcome in any activity" of the group.

"The White House ought to repudiate this bird," says Justin Finger, civil-rights director of the Anti-Defamation League of B'nai B'rith, the Jewish organization. Mr. Finger complained to the White House when he learned of the letter this summer, but he says he hasn't received any response.

Composed by Pearson Associate

Though the letter bore Mr. Reagan's signature, it was actually composed by a Person associate who had joined the White House staff. There isn't any evidence that the president knows Mr. Pearson, and Mr. Reagan's public statements on race don't bear any resemblance to Mr. Pearson's writings. But the incident shows how a highly ideological presidency--conservative or liberal--can be used by well-connected outside activities to gain respectability.

What's more, the White House isn't disavowing the letter, or repudiating Mr. Pearson, though it wants him to stop using the letter to sell subscriptions to two journals he currently publishes, The Mankind Quarterly and The Journal of Social, Political and Economic Studies.

Anson Franklin, an assistant presidential press secretary, says: "The president has long-held views opposing racial discrimination in any form, and he would never condone anything to the contrary. But that's a general statement; I'm not addressing Dr. Pearson specifically."

The White House says the letter was written after Mr. Pearson sent to the president a copy of one of his journals that didn't espouse his controversial racial views. Not all such gifts are answered so glowingly, but in this case Mr. Pearson had a champion in Robert Schuettinger, then a mid-level White House official and currently in the Defense Department.

Mr. Schuettinger says he has known Mr. Pearson for several years and is on the editorial board of one of Mr.

Pearson's publications. He concedes he wasn't aware of all of Mr. Pearson's past activities but says "there was absolutely no valid grounds to accuse him of racism," though Mr. Pearson may have been "a Littell naive" in his associations.

In two lengthy interviews, the affable Mr. Pearson largely refuses to comment on the record about his activities, though he doesn't dispute the central elements of this account of them. But he insists, "I'm not ashamed of anything I've said or written."

'Breeding Ideal Types'

Among those writings is an old article calling for the use of artificial insemination to preserve "pure healthy stock" and allow "breeding back the 'ideal' types." The 1958 article,

in a magazine Mr. Pearson founded called Northern World, also warned of a "terrible outcome" should such a program of genetic selection "fall into the hands of the cosmopolites or one-worlders, or any who wish to see our race and our heritage destroyed."

Other Pearson writings appeared in Western Destiny, a magazine published by the far right, anti-Semitic Liberty Lobby. Mr. Pearson edited Western Destiny briefly in the mid-1960s and wrote several books on race and eugenics that were issued by Liberty Lobby's publishing arm. These pamphlets are still sold by the National Socialist White People's Party, the Arlington, Va.-based American Nazi group; Mr. Pearson says he doesn't have any connection with that group.

After breaking with Liberty Lobby Leader Willis Carto in a personal dispute, Mr. Pearson began moving more into the conservative mainstream, holding academic posts at several small colleges and authorizing [sic] an anthropology textbook. In 1977, he was on the original board of editors of Policy Review, a journal published by the Heritage Foundation, a mainstream conservative think tank. Knowledgeable sources say he was asked to resign when Heritage officials learned of his background.

Mr. Pearson currently runs a tax-exempt organization called the Council on Social and Economic Studies out of a three-room suite in a downtown Washington apartment building. Besides his publishing income, he acknowledges that he also receives money from the Pioneer

Fund, a controversial New York-based trust fund dedicated to "racial betterment." The fund also has supported the work of psychologist Arthur Jensen and physicist William Shockley, who hold views on race and heridity similar to Mr. Pearson's.

Mr. Pearson's current publications, which generally play down his racial views, boast contributions from some eminently respectable conservative political figures. Spokesmen for several of Mr. Pearson's contributors say they weren't aware of his background when they submitted articles.

"Generally, conservatives are so concerned with conspiracies on the left that they don't realize when they may be part of a conspiracy on the right," asserts John Rees, a contributing editor

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of the John Birch Society's magazine and
a harsh critic of Mr. Pearson.

Appendix B

THERE'S NOTHING LIKE A LIBEL TRIAL
FOR AN EDUCATION

Capital Chronicle

By Suzanne Garment

Behind a lectern in a Washington, D.C., courtroom this week stood Mark Lane, lawyer to controversial causes of right and left, making his opening statement. He paused for emphasis before hitting the jury with his central thesis: "National Review, since its inception, has been a racist, pro-Nazi, pro-fascist publication."

National Review is the conservative magazine edited by William F. Buckley Jr. Was Mr. Lane making his charge on behalf of some aggrieved liberal--a

maligned arms-control enthusiast, perhaps, or some annoyed chapter of the American Civil Liberties Union? No, Mr. Lane's Client is the Liberty Lobby, who leader Willis Carto once promoted a Joint Council for Repatriation to help Blacks to go back to Africa. The resulting legal contest is bizarre, but also instructive.

Over the years, Liberty Lobby and Mr. Carto have sued a number of publishers that called them racist and anti-Semitic. Still pending is a Liberty Lobby suit against The Wall Street Journal, which last year called Liberty Lobby "anti-Semitic" and reported that it had published various tracts by a promoter of racial betterment through genetic selection. Liberty Lobby brought one of these results

against National Review and lost. Now a judge and jury are hearing the trial of the counterclaim.

The look of the courtroom on the trial's opening day gave notice that this was not an ordinary proceeding. True, over at National Review's table there sat a conventional bunch, Mr. Buckley and his lawyers. Across the room with Mr. Carto were the bearded Mr. Lane in friendly navy blazer and gray slacks, a young female paralegal with the kind of nose that suggests the presence of a trust fund, and a young, good-looking black female lawyer in a high-collared blouse. The moment the jury filed in--all black, as is not uncommon in the District--you began to suspect that Mr. Lane might have something in mind.

He opened with a well-known quote from Iago in Shakespeare's "Othello": "He who filches from me my good name robs me of that which enriches not him but makes me poor indeed."

Then Mr. Lane picked up speed. "Iago was an interesting character," he instructed his jury. "What he did was to bring down a great black man named Othello because he was black." "The analogy," he said, "continues in this case."

Mr. Lane explained how National Review had tried to bring down great black men. He gave a critique of the magazines' position on Adam Clayton Powell Jr. He condemned its attitude toward Martin Luther King Jr. He built to a peroration: "If you read the words of Adolf Hitler regarding superior races

and advanced races and inferior races, you will have difficulty separating the words of Mr. Buckley in his editorials in the National Review from the words of Adolf Hitler."

Mr. Lane's theme was ironic in more than the obvious ways. Today's American conservatism does indeed have part of its roots in a seedbed infested with racism, chauvinism and paranoid looniness. When National Review was found in the mid-1950s, the right's presence on the U.S. political state was small and fading; conservatism seemed fatally tied to this pernicious kookiness.

From time to time in National Review you can still hear an echo of the right's more distasteful origins. The sound fades as time passes because over

the years Mr. Buckley and his associates, with National Review as a rallying place, pried conservatism loose from the fingers of its more demented followers.

Some people would claim that these "respectable conservatives" have only managed to put an acceptable mask over what remains an illegitimate set of views. Willis Carto, for his part, clearly thinks the National Review bunch profoundly changed the character of the American right. That is presumably why he is at permanent war with it.

So we see the Liberty Lobby standing up in court and calling Mr. Buckley racist, most likely calculating that black jurors will be too hypnotized by this possibility to consider other facts important. This is not just an ordinary lawyer's trick. This is breathtaking in

its daring. Most of us would be embarrassed to appeal to a racial or religious minority audience so crudely. We know the Fair Play Patrol would at once swoop down and cart us away. But the Carto team is of sterner stuff, able to put its head down and go for broke.

It gets you thinking about libel suits in general and their place in democratic politics. They are in vogue now, especially as a way to fight the press. Without a doubt current journalistic habits deserve some fighting against. Still, these suits attacking pernicious speech generate their own share of pernicious speech. Trials held to fight destructive ugliness in American public life provide their own arena in which the parties can make ugly appeals. Highly public events like a

blazing newspaper headline, or Louis Farrakhan wowing them at Madison Square Garden, can be a grim sight. But believe me, Mark Lane in from of the jury also generates a distinct shiver.

Democracies keep searching for the rules and procedures that will keep their violent and excessively partisan tendencies surely in check. There aren't any. Each new device will prove vulnerable to abuse in its turn. The only real defense lies in imprecise areas like education and culture, where matters are never settled and battles never won.

When you catch a glimpse of the muck lying in pockets just under our political surface, you are reminded of how lucky we've been. Next time I walk

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through those courtroom doors I will
knock wood.

APPENDIX G

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

Before: Bork, Circuit Judge

ORDER

Upon consideration of Appellant's Motion for disqualification of Judge Bork pursuant to Title 28 Section 455 United States Code, it is

ORDERED, by the Court, that Appellant's aforesaid motion is denied

for the reasons set forth in the attached memorandum.

Per Curiam

For the Court:
George A. Fisher, Clerk

BY:
Patricia L. Chatman
Deputy Clerk

FILED DEC 7, 1987

No. 86-7017 -- Liberty Lobby, Inc. v.

Dow Jones & Co., Inc.

M E M O R A N D U M

I.

In this appeal, Liberty Lobby challenges the district court's dismissal of its action for defamation against defendants Dow Jones & Co., Inc. and Rich Jaroslovsky. See Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 638 F. Supp. 1149 (D.D.C. 1986). The suit

arises from two articles which appeared in The Wall Street Journal, a daily newspaper published by Dow Jones & Co. The first piece was authored by defendant Rich Jaroslovsky. The second article was authored by Ms. Suzanne Garment. Ms. Garment is not a party to this action, and is not presently employed by Dow Jones & Co. or The Wall Street Journal. There is evidence in the record indicating that Ms. Garment may have discussed her intention to write a column concerning Liberty Lobby with her husband, Leonard Garment. However, there is no evidence that Mr. Garment played any role in the composition of Ms. Garment's column.

Based upon these facts, appellant Liberty Lobby has moved for my recusal from this appeal for two reasons.

First, appellant asserts that the Garments were active supporters of my nomination to be an Associate Justice of the United States Supreme Court.

Second, appellant contends that the Garments and I are close personal friends. Under these circumstances, appellant concludes that my impartiality might reasonably be questioned, and thus recusal is mandated under 28 U.S.C.

§ 455 (1982). After careful consideration of appellant's filings, I have concluded that my recusal from this matter is unwarranted.

II.

I have no connection, financial or otherwise, with any of the named parties in this proceeding. The basis for appellant's motion is that two individuals, one of whom is only

tangentially involved with this lawsuit, were active supporters of my nomination to be an Associate Justice of the United States Supreme Court. Appellant contends that these two individuals, Suzanne and Leonard Garment, "were apparently the two most active persons in the United States in support of Judge Bork's nomination...." Appellant's Motion for Disqualification at 2. Appellant also alleges that Leonard Garment acted as my "unofficial spokesperson" during the confirmation process and that "it was widely reported in the press" that both Mr. and Ms. Garment authored numerous documents in support of my nomination. Id. at 2. Appellant further contends that Mr. and Ms. Garment have "held themselves out to be close friends and associates of Judge

Bork." Id. According to appellant, these alleged facts render this action a "proceeding in which [my] impartiality might reasonably be questioned," thus mandating recusal. 28 U.S.C. § 455(a) (1982).

III.

It is well-settled that a judge faced with a recusal motion under section 455 must evaluate the truth or falsity of the allegations set forth in the motion for disqualification. See United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981). In this case, the contention that Mr. Garment was my spokesperson or agent, officially or unofficially, is untrue. Mr. Garment's actions in support of my nomination were not in any way coordinated with or endorsed by me. Mr. Garment played no

role in my preparation for the hearings or in any of my subsequent activities connected with the confirmation process.

Many groups and individuals took strong public positions for or against my confirmation. Were I to recuse myself every time an individual or group who had supported or opposed my confirmation was connected with a lawsuit, however tangentially, I would, in my opinion, be failing in my judicial duty and be of greatly diminished usefulness to this court and the litigants it serves. Cf. Code of Judicial Conduct for United States Judges, Canon 3A(1) ("A judge should be unswayed by partisan interest, public clamor, or fear of criticism."). For these reasons, I believe that recusal on the grounds that Mr. and Ms. Garment were supporters of

my nomination would be wholly unwarranted.

Appellant's motion also suggests that Mr. and Ms. Garment and I are close personal friends. Mr. Garment is a well-known lawyer in Washington. We served in the same administration some years ago, and we meet occasionally at social functions. Under Canon 13 of the ABA Canons of Judicial Ethics recusal is mandatory where "a near relative is a party." The Advisory Committee on Judicial Activities has suggested that as far as friendships are concerned, recusal is in no sense mandatory. The judge must determine whether an acquaintance is "a very close friend and almost part of the family" or "merely within the wide circle of a judge's friendships. "Advisory Opinion No. 11

(January 21, 1970). I have no difficulty in finding that my friendship with the Garments falls into the latter category.

Moreover, it is far from clear that the Garments' rather tenuous connection with this lawsuit would render recusal proper even if our relationship were more substantial. Liability is not asserted against either of the Garments. Leonard Garment's only connection to this action is the fact that his wife may have discussed with him her intention to write a column concerning Liberty Lobby. Given the attenuated nature of Mr. Garment's connection with this lawsuit, and my purely social acquaintance with both the Garments, I am confident in my ability to render an impartial judgment.

Under these circumstances, I feel fully capable of disregarding this relationship and I feel others can reasonably be expected to believe that the acquaintance is disregarded. See Advisory Opinion No. 11.

For the foregoing reasons, the motion for my recusal is denied.

APPENDIX H

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.
and Rich Jaroslovsky

Before: Edward, Bork and Williams,
Circuit Judges

ORDER

It is ORDERED, by the Court, sua
sponte, that this Court's November 19,
1987, Order allocating times for oral
argument is hereby vacated. And, it is

FURTHER ORDERED, by the Court, sua
sponte, that the following times are
allotted for the oral argument:

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Appellant -- 15 minutes

Appellee -- 15 minutes

Only one counsel per side will be
allowed to argue.

Per Curiam

For the Court:
George A. Fisher, Clerk

By:
Catherine L. Bateman
Deputy Clerk

FILED DEC 7, 1987

APPENDIX I

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc.
and Rich Jaroslovsky, Appellees.

APPELLANT'S MOTION FOR DISQUALIFICATION
OF HONORABLE ROBERT H. BORK
PURSUANT TO TITLE 28 SECTION 455
UNITED STATES CODE

The appellant respectfully requests that Honorable Robert H. Bork recuse himself from hearing the argument of this cause set for December 8, 1987, in that his impartiality might be reasonably questioned as a result of his close association with two of the central figures in the case. The appellant

submits herewith a statement of points and authorities and one page from the testimony of Suzanne Garment in support of this motion. Inasmuch as the title of the case could not reveal to Judge Bork or to any other person the basis upon which this motion is founded, appellant specifically states that it alleges no wrongdoing or misconduct by Judge Bork.

November 23, 1987

Respectfully submitted,

Mark Lane
132 Third Street, S.E.
Washington, D.C. 20002
(202) 547-6700

Counsel for Appellant

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc.
and Rich Jaroslovsky, Appellees.

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF APPELLANT'S MOTION FOR
DISQUALIFICATION OF HONORABLE ROBERT H.
BORK PURSUANT TO TITLE 28 SECTION
UNITED STATES CODE

Introduction

An examination of the title of the case neither reveals nor provides evidence as to the names of the parties with whom Judge Bork has a relationship. For that reason the appellant neither states nor implies that Judge Bork has engaged in any improper conduct. The appellant asserts, pursuant

to Title 28 Section 455(a) that the impartiality of Judge Bork might be reasonably questioned given the circumstances of this case.

The Facts

An article published by appellees, and a basis of the action for defamation brought by the appellant, was written by Suzanne Garment after consultation with her husband Leonard Garment, Esquire. The record reveals that Ms. Garment had little legal background and a paucity of knowledge of legal matters and implies that her husband, Leonard Garment, Esquire played a larger role in the development of the article than previously admitted. What is uncontroverted is the fact that Mrs. Garment wrote the defamatory article and that she had

consulted with her husband, Leonard Garment, Esquire, about it.

It is also clear that both Leonard Garment, Esquire and Suzanne Garment held themselves out to be close friends and associates of Judge Bork and were apparently the two most active persons in the United States in support of Judge Bork's nomination to the United States Supreme Court. Mr. Garment appeared on numerous radio and television programs as the unofficial spokesperson for Judge Bork during that period, released Judge Bork's position to the news media at least on one occasion, ostensibly with Judge Bork's permission. In addition, it was widely reported in the press that Suzanne Garment, the author of a defamatory article in this case, was also the author, with here husband, of documents

widely circulated in support of Judge Bork's nomination to the Supreme Court.

Under the circumstances, it seems clear that Judge Bork's impartiality in this matter might reasonably be questioned and that due to actions which have taken place outside the four corners of the courtroom, it might be asserted the Judge Bork would be more favorably inclined toward the appellees.

The Law

The United States Court of Appeals for the District of Columbia held that "Section 455 contains a provision calling for disqualification in a 'proceeding in which [a judge's] impartiality might be reasonably questioned,' [and] we join our sister circuits in concluding that a showing of an appearance of bias or prejudice sufficient to

permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under 455." United States v. Heldt, 668 F.2d 1238, 1277 (D.C. Cir. 1981). In support of that contention the Court of Appeals cited United States v. Mirkin, 649 F.2d 78 (1st Cir. 1981); In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978), Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), cert denied 499 U.S. 820, 101 S.Ct. 78 (1981); Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980); SCA Servs, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); United States v. Poludniak, No. 80-2133 (8th Cir. Aug. 14, 1981); Wood v. McEwen, 622 F.2d 797, 802 (9th

Cir. 1981); United States v. Ritter, 540 F.2d 459 (10th Cir.) cert denied, 429 U.S. 951, 97 S.Ct. 370 (1976).

The District of Columbia Court of Appeals addressed the question of the recusal of the administrative officer who acted in a adjudicative or quasi-judicial capacity in Morrison v. District of Columbia Board of Zoning Adjustment, 422 A.2d 347 (D.C.App. 1980). In Morrison the Court held that it has generally been recognized that the same rules required the recusal of judicial officers are applicable to administrative officers who act in a adjudicative or quasijudicial capacity. In that case, the court ruled:

In the absence of a statute provided otherwise, a judge must recuse himself when his alleged bias arises from outside the "four corners of the court-room," Tynan v. United States, 126 U.S.App. D.C.. 206, 210,

376 F.2d 761, 765, cert denied, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111. 1956), and results in "an opinion on the merits on some basis other than what a judge learned from his participation of the case." In re Evans, D.C.App. 411 A.2d 984, 955 (1980), quoting United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 17120, 16 L.Ed.2d 778 (1966).

Morrison v.
District of Columbia, etc.
422 A.2d 347, 350 (D.C. App. 1980)

In Evans cited above the Court concluded "the appearance of bias on the part of the trial judge necessitates reversal" 411 A.2d at 993, and found that Rule 63-I [comparable to the sections under which this motion has been brought] "is by its terms mandatory," citing Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 127 U.S.App.D.C. 23, 29, 380 F.2d 570, 576, cert denied, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). The Evans court continued "[i]f

an affidavit meets the rule's standards, the judge has a duty to recuse himself. Morse v. Lewis, 54 F.2d 1027, 1031 (4th Cir), cert denied, 286 U.S. 577, 52 S.Ct. 640, 76 L.Ed. 1291 (1932).

Conclusion

For the reasons set forth above the appellant respectfully requests that Judge Bork recuse himself from consideration of this matter with the clear understanding that the appellant does not state or imply that Judge Bork has acted improperly in any fashion regarding this matter.

November 23, 1987

Respectfully,

Mark Lane
132 Third Street, S.E.
Washington, D.C. 2002

Counsel for Appellant

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc.,
and Rich Jaroslovsky, Defendants

DEPOSITION OF SUZANNE R. GARMENT

Washington, D.C.

Monday, November 18, 1985

Deposition of SUZANNE R. GARMENT,
called for examination pursuant to
notice of deposition, at the law offices
of Mark Lane, Esq., 105 Second Street,
N.E., at 1:07 p.m. before REBECCA E.
EYSTER, a Notary Public within and for
the District of Columbia, when were
present on behalf of the respective
parties:

MARK LANE, ESQ.
105 Second Street, N.E.
Washington, D.C. 20002
On behalf of the Plaintiff.

ROBERT P. LO BUE, ESQ.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10112
On behalf of the Defendants

ALSO PRESENT:

Brent Whitmore

Q Did you discuss this proposed
column with your husband?

A I must have--I would guess that I
told him that I was going.

MR. LO BUE: I think I should
instruct the witness that there is an
interspousal immunity at this point
which she can claim.

BY MR. LANE:

Q Not to the question of whether
she discussed it with him.

MR. LO BUE: That is fair enough, but everything further, the actual content, would be privileged.

THE WITNESS: I would guess that I did.

BY MR. LANE:

Q Is he a lawyer?

A Yes.

Q And has he been a lawyer for officials of the United States Government?

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Motion for Disqualification of Honorable Robert H. Bork Pursuant to Title 28 Section 455 United States Code and accompanying Statement of Points and Authorities in support thereof was mailed, first class, postage prepaid to Robert P. LoBue, Esquire, Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, New York 10112 on this 23rd day of November, 1987.

Mark Lane

RECEIVED NOV 23, 1987

APPENDIX J

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

ORDER

It is ORDERED, by the Court, sua
sponte, that the following times
allotted for the oral argument of the
above entitled case(s):

Appellant -- 30 minutes

Appellee -- 30 minutes

The panel considering this case will
now consist of Circuit Judges Edwards

and Bork and Senior District Judge
Parker.

For the Court:
George A. Fisher, Clerk

By:
Linda E. Jones
Deputy Clerk

FILED NOV 19, 1987

APPENDIX K

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Appellant

v.

Dow Jones & Company, Inc., et al.

ORDER

It appearing from the briefs filed by the parties that the above entitled case may not fall within the intent and purpose of Rule 13(i) of the General Rules of this Court, it is

ORDERED that oral argument be heard on Tuesday, December 8, 1987 at 9:30 a.m. before Judges Robinson, Edwards and Parker.

A further order of the Court will be issued regarding allocation of time for oral argument. The attached Form 72 should be completed and returned to the clerk's office on or before December 1, 1987.

For the Court:
George A. Fisher, Clerk

By:
Patricia L. Chatman
Deputy Clerk

FILED NOV 4, 1987

APPENDIX L

United States Court of Appeals
For the District of Columbia Circuit

No. 86-7017

Liberty Lobby, Inc., Plaintiff,

v.

Dow Jones & Company, Inc.
and Rich Jaroslovsky
Defendants.

ORDER

Upon consideration of plaintiff's motion to stay proceedings pending disposition of appeal, defendants' opposition thereto, and the entire record herein, it is, this 24th day of September, 1986,

ORDERED that plaintiff's motion is granted; and it is FURTHER ORDERED, that defendants' motion for sanctions is held

in abeyance until disposition of the
appeal of this case by the United States
Court of Appeals.

Thomas Penfield Jackson
U.S. District Judge

FILED SEP 25, 1986

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3455
(Jackson, J.)

LIBERTY LOBBY, INC.

Plaintiff

v.

DOW JONES & COMPANY, INC.
and RICH JAROSLOVSKY

Defendants.

MOTION ASSERTING BIAS OR
PREJUDICE OF THE COURT AND
FOR DISQUALIFICATION OF JUDGE JACKSON

The plaintiff respectfully requests that pursuant to §144 of Title 28 of the United States Code and pursuant to §455 of Title 28 of the United States Code, that the Court be disqualified due to bias and prejudice against the plaintiff

and in favor of the defendants and that the Court disqualify itself in this proceeding because his impartiality might be reasonably questioned.

In support of this motion the plaintiff submits herewith the Affidavit of Willis A. Carto, Exhibits attached hereto and the Certificate of Counsel Supporting the Affidavit pursuant to Title 28 of the United States Code as well as a statement of points and authorities.

September 25, 1986

Respectfully submitted,

Frank Flury
5811 Baltimore Avenue
Riverdale, Maryland 20737
(301) 927-3400

D.C. Bar # 70557

Mark Lane
105 Second Street, N.E.
Washington, D.C. 20002
(202) 547-6700

Member New York State Bar

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3455
(Jackson, J.)

LIBERTY LOBBY, INC.

Plaintiff

v.

DOW JONES & COMPANY, INC.
and RICH JAROSLOVSKY

Defendants.

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION ASSERTING
BIAS OR PREJUDICE OF THE COURT AND
FOR DISQUALIFICATION OF JUDGE JACKSON

The plaintiff herein has moved pursuant to §144 of Title 28 of the United States Code for the withdrawal of Judge Jackson based upon the Affidavit attached hereto asserting that the Court has a personal bias or prejudice against the plaintiff and in favor of the

defendants, and requesting that the Court proceed no further therein but that another judge be assigned to hear such proceeding. The Affidavit submitted herewith in accordance with §144 U.S.C. Title 28 states the facts and reasons for the belief that bias or prejudice exists and is submitted herewith with a Certificate of Counsel of record stating that it is made in good faith.

The plaintiff herein has also moved for the disqualification of Judge Jackson pursuant to 455 of Title 28 of the United States Code, asserting that the Court should disqualify himself in this proceeding because his impartiality might be reasonably questioned.

In support of each motion the plaintiff submits the Affidavit of Willis A.

Carto, an officer of the plaintiff corporation.

The United States Court of Appeals for the District of Columbia held that "§455 contains a provision calling for disqualification in a 'proceeding in which [a judge's] impartiality might be reasonably questioned,' [and] we join our sister circuits in concluding that a showing of an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under §455." United States v. Heldt, 668 F.2d 1238, 1277 (D.C. Cir. 1981). In support of that contention the Court of Appeals cited United States v. Mirkin, 649 F.2d 78 (1st Cir. 1981); In re International Business Machines Corp., 618 F.2d 923,

929 (2d Cir. 1980); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978); Postashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), cert denied 449 U.S. 820, 101 S.Ct. 78 (1981); Robert v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980); SCA Servs. Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); United States v. Poludniak, No. 80-2133 (8th Cir. Aug. 14, 1981); Wood v. McEwen, 622 F.2d 797, 802 (9th Cir. 1981); United States v. Ritter, 540 F.2d 459 (10th Cir.) cert denied, 429 U.S. 951, 97 S.Ct. 370 (1976).

The District of Columbia Court of Appeals addressed the question of the recusal of the administrative officer who acted in a adjudicative or quasi-judicial capacity in Morrison v. District of Columbia Board of Zoning

Adjustment, 422 A.2d 347 (D.C.App. 1980). In Morrison, the Court held that it has generally been recognized that the same rules requiring the recusal of judicial officers are applicable to administrative officers who act in a adjudicative or quasi-judicial capacity. In that case, the court ruled:

In the absence of a statute providing otherwise, a judge must recuse himself when his alleged bias arises from outside the "four corners of the court-room," Tynan v. United States, 126 U.S.App. D.C. 206, 210, 376 F.2d 761, 765, cert denied, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111. 1956), and results in "an opinion on the merits on some basis other than what a judge learned from his participation of the case." In re Evans, D.C.App. 411 A.2d 984, 995 (1980), quoting United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

Morrison v.
District of Columbia, etc.
422 A.2d 347, 350 (D.C. App. 1980)

In Evans cited above the Court concluded "the appearance of bias on the part of the trial judge necessitates reversal" 411 A.2d at 993, and found that Rule 63-I [comparable to the sections under which this motion has been brought] "is by its terms mandatory," citing Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 127 U.S.App.D.C. 23, 29, 380 F.2d 570, 576, cert denied, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). The Evans court continued "[i]f an affidavit meets the rule's standards, the judge has a duty to recuse himself. Morse v. Lewis, 54 F.2d 1027, 1031 (4th Cir), cert denied, 286 U.S. 557, 52 S.Ct. 640, 76 L.Ed. 1291 (1932).

For the reasons set forth above and contained in the Affidavit of Willis A.

Carto attached hereto the plaintiff respectfully requests that due to the allegations of personal bias or prejudice against the plaintiff and in favor the defendants, the Court proceed no further herein but another judge be assigned to hear this proceeding pursuant to 144 Title 28 of the United States Code and that the Judge disqualify himself in this proceeding because his impartiality might be reasonably questioned in conformity with 455 Title 28 of the United States Code.
September 25, 1986

Respectfully submitted,

Frank Flury
5811 Baltimore Avenue
Riverdale, Maryland 20737
(301) 927-3400

D.C. Bar # 70557

Mark Lane
105 Second Street, N.E.
Washington, D.C. 20002
(202) 547-6700

Member New York State Bar

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3455
(Jackson, J.)

LIBERTY LOBBY, INC.

Plaintiff

v.

DOW JONES & COMPANY, INC.
and RICH JAROSLOVSKY

Defendants.

AFFIDAVIT OF WILLIS A. CARTO

District of Columbia, ss:

Willis A. Carto, being duly sworn
deposes and says that:

I am the treasurer of Liberty Lobby,
Inc., the plaintiff in the above-
entitled case.

I make this affidavit in support of
a motion to recuse Honorable Thomas
Penfield Jackson as the presiding and

determining officer in the motion for sanctions filed by the defendants against Liberty Lobby, Inc., Mark Lane, Esq. and Fleming Lee, Esq. This effort is not made on behalf of Fleming Lee, Esq. who, as I understand it, is representing himself.

Background

The following paragraphs are presented regarding the background information which led me to conduct a cursory examination as to the possible relationship between Leonard Garment, Esq., his wife, Suzanne Garment, and Judge Jackson. This is not an academic application because I fear that the facts may prevent a fair and impartial consideration, but it is based upon what appears to me to be biased and unfair decisions in the courtroom which have led me to

try to understand why such actions took place. It is my understanding that hostility or animus in the courtroom or even what one party believes to be unfair treatment by a judge may not form the basis for a formal motion for recusal. The background material presented below is not offered to demonstrate that Judge Jackson should be recused because of his conduct in the courtroom, but rather explains why I was constrained to look into Judge Jackson's possible connections with central figures in this case and why I did not at the very outset make this motion.

This application is, however, neither based solely upon Judge Jackson's conduct in the courtroom, nor solely upon his possible connections with figures in this case, but is based

upon a combination of these factors which lead me to believe that the partial and bias conduct of Judge Jackson set forth in summary in this portion of the affidavit entitled background can be explained by Judge Jackson's possible connections with a figure or figures in this case.

For some years Mark Lane, Esq., who is not the general counsel of Liberty Lobby, Inc., and who has never served in that capacity, has provided legal representation in some cases in which Liberty Lobby, Inc. has been involved either as a plaintiff or a defendant. I have had an opportunity to observe the relationship between Mr. Lane and members of the federal judiciary, including various judges in the United States District Court in Washington, D.C., in a trial

before a United States District Court in Miami, Florida, and arguments before the United States Court of Appeals for the District of Columbia, and the United States Supreme Court. My observations have included an examination of the transcript of such proceedings and my personal observation while the hearing, trial or argument was taking place.

Although a number of the cases were of a highly controversial nature and some were charged with emotional issues, I have observed a mutually respectful exchange between Mr. Lane and the various judges and justices.

In reading the transcript of hearings before Judge Jackson in the instant case I was struck and alarmed by the tenor, tone and sharp and threatening language directed to Mr. Lane by Judge

Jackson when the record revealed no apparent provocation. The specifics of these remarks I will address below.

Based upon my concern for the right of Liberty Lobby, Inc. to secure a fair hearing before Judge Jackson, I interviewed Mr. Lane. Some of the allegations made by Judge Jackson to and about Mr. Lane I knew to be without any foundation in fact. For example, Judge Jackson stated on February 27, 1986 that:

Yes. The flavor that I get of this entire deposition is that it was largely conducted by you [Mr. Lane] out of pique at the way in which you feel that Ms. Garment characterized your performance in another trial.

(Hearing Transcript,
February 27, 1986, pp.
21-22, Emphasis Added)

Two assertions by the Court in that one sentence deeply concerned and troubled me. The record revealed without question that the Garment deposition had not

been filed with the Court. (Hearing Transcript, February 27, 1986, p. 37) Therefore, Judge Jackson could not know through ordinary process what the entire deposition revealed. Of greater concern to me was the allegation that it was Mr. Lane, not Liberty Lobby, Inc., who was concerned about the defamatory article written by Ms. Garment about Liberty Lobby. Mr. Lane was not at liberty to breach an attorney-client privilege when he appeared before the Court and thus was prevented from adequately defending himself against the charge made by the Court.

These are the facts. After the article by Ms. Garment was published in The Wall Street Journal, at my initiative I discussed the matter with Mr. Lane. I was concerned that the article

republished the previously published defamation in the midst of pretrial preparations in this case and that the article was clearly designed to improperly assist National Review, Inc. in a trial then taking place in the United States District Court. Subsequently we discovered that the attorney for National Review, Inc. was responsible for the publication of the article entirely hostile to Liberty Lobby, Inc. which was in fact published by The Wall Street Journal during the second day of the trial between Liberty Lobby, Inc. and National Review, Inc.

The jury was comprised entirely of black residents of the District of Columbia. The allegation that Liberty Lobby, Inc. was a racist organization seeking to manipulate or hypnotize black

jurors was clearly intended to interfere with the course of justice in that case, in my view. Consequently, I discussed the matter with Mr. Lane. I was concerned that if we ignored the republication of the original defamation and the entirely false statements made about Liberty Lobby, Inc. by Ms. Garment, that Liberty Lobby, Inc. might in some fashion be weakening its case against Dow Jones & Co., Inc. I knew the allegation by Ms. Garment which implied that Liberty Lobby, Inc. sought an all black jury was entirely false since I had participated at the counsel table in the selection of jurors and since as I recall, the white prospective jurors were challenged by National Review, Inc.

While I was deeply concerned about the false statements contained in the

article by Ms. Garment, Mr. Lane said that he was both concerned for Liberty Lobby, Inc. but somewhat amused in terms of how he emerged from the article by Ms. Garment. Mr. Lane said to me that while Liberty Lobby, Inc. was alleged to be racist and unprincipled and while Ms. Garment implied that the jury system might not function equitably in this case, that he, Mr. Lane, came off in the article as a courtroom magician who might be able to secure remarkable results for a client. Mr. Lane said to me that while Ms. Garment cast aspersions upon Liberty Lobby, Inc. and the system of justice, he was afraid that prospective clients might be knocking at his door as a result of the Garment article. At my request the complaint was amended and supplemented to include

the Garment piece. Mr. Lane's "pique" played no part in that decision; indeed, Mr. Lane's personal response, as opposed to his response as counsel for the plaintiff, was one of amusement.

After the Court made several similar statements to Mr. Lane, I questioned Mr. Lane about his own personal relationship with Judge Jackson. Mr. Lane told me that he had appeared in Judge Jackson's courtroom in relationship to two other matters and that on one of those occasions he merely accompanied his colleague, Linda Hubert, Esq., who was counsel for a party not represented by Mr. Lane. Mr. Lane said that both cases were matters which were the subject of dispositive motions and that in each case, due to the change in interpretation of the law, the Court could

reasonably decide the dispositive motions by granting or denying them. Mr. Lane stated that in the matter in which he was directly involved Judge Jackson granted the adversary's dispositive motion but that he, Mr. Lane, believed that the Court had not acted improperly in any respect in doing so. Mr. Lane added that Judge Jackson treated him with courtesy and respect in his appearances before the Court on those occasions and that Judge Jackson's memorandum opinion was fair and scholarly.

Regarding the matter which Ms. Hubert argued, Mr. Lane told me that Judge Jackson did not grant the adversary's motion and that subsequently the United States Court of Appeals found that to be error. On that occasion, as

well, Mr. Lane stated that Judge Jackson treated counsel with courtesy and respect.

As I read through the transcripts and interviewed those who were present during appearances in this case before Judge Jackson, it seemed clear to me that at the outset the Court treated all counsel with courtesy and respect and dealt fairly with the matters then pending before the Court.

It occurred to me that dramatically and suddenly Judge Jackson took a partisan interest in the case and that that change followed immediately upon the involvement in this case of Ms. Suzanne Garment; that is, after the original complaint, in which Ms. Garment played no part was amended and supplemented due

to a subsequent article written by Ms. Garment.

The record reveals that Judge Jackson had cautioned parties for both sides to be cooperative during discovery and that Fleming Lee, Esq., who was then counsel for Liberty Lobby, Inc., took that to mean that all of the files of Liberty Lobby, Inc., however irrelevant, were to be made available to the defendants. However, after the appearance of Ms. Garment in this case, the Court did not apply to Ms. Garment the standard that most things are discoverable and should be made available to the other party. Indeed, Ms. Garment and her attorneys terminated a deposition by leaving, stating that the deposition had gone on long enough, and by refusing to continue the deposition at any future

date. Although I understand the temptation to take such action, since I have been deposed many times for many hours, my attorneys have always told me that it was improper and reckless behavior to unilaterally terminate a deposition and refuse to answer questions, informing me that the only appropriate procedure was to file for a protective order with the court and thereafter to act in accordance with the decision of the court. As I understand in this case, Ms. Garment and her attorney left the deposition and did not even file an application for a protective order.

At my direction counsel for the plaintiff filed a motion to compel Ms. Garment to continue the deposition until it was completed. In opposition, the

defendants objected submitting as evidence some thirty odd selected pages from the deposition of Ms. Garment out of the hundreds of pages. I have read the deposition of Ms. Garment and it is quite clear that Ms. Garment refused to answer very simple questions which were not even arguably objectionable. These questions were similar to questions which I have answered on numerous occasions as an officer of a publishing company and both as a defendant and a plaintiff.

Judge Jackson refused to permit Mr. Lane to ask any more questions of Ms. Garment and although it was clear that the Court had not read the deposition, he stated that "I cannot conceive of being unable to get all of the information that could conceivably be relevant

to the case from a witness in fourteen hours and fifteen minutes worth of interrogation whether she spent time reading the articles or not." (Hearing Transcript, January 17, 1986, p. 3)

Mr. Lane asserted during that hearing that Ms. Garment spent a considerable period of that time reading to herself and that there was no doubt in Mr. Lane's mind that Ms. Garment could have provided the relevant information if she wished to do so but that an examination of the transcript revealed that she refused to do so. (Hearing Transcript, January 17, 1986, p. 4)

In addition, Mr. Lane asked that the defendants provide the many editorials which Ms. Garment had written about matters directly related to the defamatory article in question. This, the

defendants refused to do. When this was brought to the attention of the Court, Judge Jackson stated "[e]ditorials are opinions, anyhow." (Hearing Transcript, January 17, 1986, p. 7) Judge Jackson therefore ruled that Dow Jones & Co., Inc. need not provide those writings of Ms. Garment. While it is true that editorials may be matters of opinion, it is also true that they may contain, indeed be comprised of, allegations of fact which may be untrue and which may be the basis for an action of defamation. But far more relevant is the fact that matters of opinion are discoverable during the pretrial period, especially, as in this instance, when those opinions may be directly related to the charged defamation. Indeed, in order to establish the presence of actual malice,

which the Court later held the plaintiff had failed to do in this case, the plaintiff is constrained to examine the published opinions of the agent of the defendant who wrote the defamatory article which the defendant published.

By contrast I was struck that the defendants secured hundreds of documents from the archives maintained by Liberty Lobby, Inc., in raw and unassessed files entitled "Jews I" and "Jews II." The defendants falsely stated that all of these articles were defamatory when in fact, the vast majority of them were published by purportedly neutral sources including The Wall Street Journal, The New York Times and The Washington Post, while any others were published by Jewish publications and were entirely laudatory of Jews and Zionism. Yet, the

Court in granting the defendants dispositive motions, relied upon the defendants description of those files, when the files which were in evidence, together with the plaintiff's analysis of those articles proved that the defendants' assertions about the articles were entirely false. It was my understanding that the Court was obligated, in considering a motion for summary judgment to view the evidence in a light favorable to the non-moving party and to accept the inferences from that evidence in a light most favorable to the non-moving party.

Thus, the Court while not permitting the plaintiff to even see the relevant editorials of Ms. Garment, which might reveal her bias toward Liberty Lobby, Inc. relied upon a raw file, similar to

the one maintained by the United States Government at the Library of Congress as a factor to be relied upon in granting the dispositive motion of the defendants.

After it became clear that the Court had retroactively endorsed the walk-out from the deposition by Ms. Garment and her counsel, I asked Mr. Lane how we could proceed. Due to the inability of Liberty Lobby, Inc. to secure answers to basic and relevant questions required for the prosecution of this law case, I thought the case might be lost. I was most concerned that we were unable to secure from Ms. Garment, in spite of continuing questions, whether or not The Wall Street Journal had any standards regarding the publication of articles, and since I presumed there were such standards, what those standards were. I

know that as the deposed person for a defendant publisher I have always been constrained to answer those basic and threshold questions. I asked Mr. Lane if he could call to the Court's attention the fact that it would be difficult for the plaintiff to meet the difficult burden of establishing malice on the part of the defendants, if we could not even find out what the standards of the publisher were. Accordingly, Mr. Lane agreed to file a motion specifically requesting that Ms. Garment answer specific questions. Such a motion was filed and at the hearing in regard to that motion the Court refused to allow Mr. Lane to asked those questions of Ms. Garment.

It is during that hearing held on February 27, 1986 that Judge Jackson

made remarks which I believe revealed him to be biased toward Ms. Garment and the defendants. That being so, I attach the entire transcript of that hearing to this document so that it can be seen that what I considered to be most alarming and that which I discuss is not taken out of context. It is during that hearing that Judge Jackson accused Mr. Lane of conducting the entire deposition largely out of personal pique. (Hearing Transcript, February 27, 1986, p. 22)

Judge Jackson also stated that the plaintiff, or counsel for the plaintiff was engaged in "some sort of vendetta between Liberty Lobby and National Review." (Hearing Transcript, February 27, 1986, p. 22)

Mr. Lane pointed out that he had asked a simple question of Ms. Garment

"[d]oes The Wall Street Journal to your knowledge, have any standards which apply to persons who write for it."

(Hearing Transcript, February 27, 1986, p. 24-25) Since Ms. Garment had not answered the question during the deposition, Mr. Lane was seeking the Court's assistance in permitting him to continue the deposition to secure an answer to that question as well as an answer to the next logical question, "[w]hat are the standards?" and other specific relevant questions also. (Hearing Transcript, February 27, 1986, p. 28)

At first, counsel for the defendants asserted that the question as to whether or not there were any standards required a "complex" answer. (Hearing Transcript, February 27, 1986, p. 25) The

Court intervened stating that undoubtedly there are standards at The Wall Street Journal. (Hearing Transcript, February 27, 1986, p. 26) When counsel for the defendants sought to argue with the Court, Judge Jackson stated "[n]o, but there are standards. They don't publish things that are libelous."

(Hearing Transcript, February 27, 1986, p. 26) Of course, whether The Wall Street Journal publishes things that are libelous was not only important to the case but in fact, comprised the case pending before the Court. Judge Jackson spared Ms. Garment the necessity of answering that question by securing from the defendants a stipulation that to the question "are there standards" her answer would be "yes." (Hearing Transcript, February 27, 1986, pp. 26-27)

At that point, Mr. Lane requested that he be able to secure an answer to the question "[w]hat are the standards?" (Hearing Transcript, February 27, 1986, p. 27)

Although the answer to that question was central to the case, in that if Liberty Lobby could establish that The Wall Street Journal violated its own standards in publishing Ms. Garment's piece, or that Ms. Garment violated those standards as she understood them in writing the piece, the plaintiff would have begun to develop evidence of actual malice Judge Jackson refused to permit Liberty Lobby to secure an answer to that question. Judge Jackson asked Mr. Lane "[l]et me ask you. Is that your question: 'what are the standards?' (Hearing Transcript,

February 27, 1986, p. 28) Mr. Lane replied in the affirmative stating that Liberty Lobby, Inc. had been trying for months to secure that answer. Judge Jackson ruled.

That is not only argumentative, but it's vague and irrelevant. Any motion to compel the question as so rephrased is denied.

(Hearing Transcript,
February 27, 1986, p. 28)

How it is possible that the question "what are the standards" is argumentative is not clear to me, especially in view of the context which reveals, that moments before and for the first time, a stipulation was entered into that there were standards. Since the plaintiff has the heightened burden of establishing actual malice, I cannot understand how it can be irrelevant to know what the standards of the publisher are or how it

can be said that that question was vague when the stipulation establishing that there were such standards had just been entered into.

My reading of that entire deposition in which this is just one example of what appeared to me to be partial conduct by the Court, convinced me that something had happened suddenly to deny to Liberty Lobby, Inc. a fair trial. Later during that hearing Judge Jackson stated that the deposition conducted by Mr. Lane was improper and that "I have spent enough time in practice, Mr. Lane, as a trial lawyer myself, to know an abusive deposition when I see one."

(Hearing Transcript, February 27, 1986, p. 36, Emphasis Added) However, Judge Jackson had not seen the deposition at

that point since it had not been filed.

Judge Jackson continued:

You are fortunate, sir, that Mr. LoBue was not put to the trouble of having to file a written response to this. I would, had he done so, award costs and attorneys fees. I assure you that it will occur in the future if there is a further motion or a further deposition of this nature in this lawsuit.

(Hearing Transcript,
February 27, 1986, p. 36)

The warning by Judge Jackson to Liberty Lobby, Inc., and its counsel not to file further motions or conduct further depositions of an undetermined nature, impacted adversely upon Liberty Lobby's right to a fair trial. The accurate assertion by Judge Jackson that the defendants had not even submitted a written response to the Motion to Compel further illuminates the actions of Judge Jackson. I wondered how it can be said that the motion by Liberty Lobby, Inc.

which resulted, for the first time, in an answer to the question as to whether or not The Wall Street Journal has any standards which apply to persons who write for it, could be also determined by the Court to be a motion for which Liberty Lobby might be taxed costs and attorney's fees and the basis of a warning not to do it again.

After Judge Jackson made a series of derogatory and critical comments regarding Mr. Lane's conduct of a deposition, a transcript of which the Court had never seen, Mr. Lane stated that in his thirty-five years of practice no judge had ever said anything similar to what Judge Jackson had just said to him. (Hearing Transcript, February 27, 1986, p. 36) Judge Jackson responded as follows:

Then its about time that it should happen, Mr. Lane.

(Hearing Transcript, Feb. 27, 1986, p. 36)

During the course of these proceedings when the animus of the Court toward the plaintiff and counsel for the plaintiff was demonstrated by the Court, Mr. Lane, on two occasions, asked the Court to consider recusing itself. (Hearing Transcript, February 27, 1986, pp. 22, 37) Indeed, when Mr. Lane stated that he "respectfully request[s] the Court to consider recusing itself in this matter" (Hearing Transcript, February 27, 1986, p. 22) the Court denied the motion and directed Mr. Lane not to be heard on the motion.

The warning to Liberty Lobby and its counsel referred to above was not the first such warning made by the Court to

Liberty Lobby and its counsel. On January 17, 1986, during colloquy between Mr. Lane and Judge Jackson, the Court's previously entered order denying the plaintiff's application to amend the complaint to add counsel for the defendants (who apparently had participated in publishing the defamatory matter which was the basis for the lawsuit at the outset in the article by Ms. Garment) Mr. Lane asked if he might resubmit that motion inasmuch as the Court had denied the application without an explanation. (Hearing Transcript, February 27, 1986, p. 19) Judge Jackson ruled that Mr. Lane could not do so, and agreed that Liberty Lobby could file a separate lawsuit against the law firm. Mr. Lane, in addressing the question of judicial economy, stated that he would

be constrained, while filing that case to reveal that it was a related case and that under the circumstances it might be referred to Judge Jackson. Judge Jackson responded:

It probably will come back to me but it's not going to be tried together with this one. And I would act with a good deal of circumspection before you do that.

(Hearing Transcript,
February 27, 1986, p. 19)

Of course, "circumspection" is a warning in which a party is put on notice to be concerned about adverse possible consequences. Reference to "a good deal of circumspection" appears to me to strengthen the warning.

Although I serve as an executive officer for Liberty Lobby, Inc., and therefore have testified on behalf of Liberty Lobby, Inc. in cases involving that organization and The Spotlight,

which for some time was published by Liberty Lobby, Inc., I have never submitted an affidavit in support of the recusal of any judge prior to this time. The politics of the organizations with which I am associated are highly controversial, well-known and, while supported by some, are vigorously and emotionally opposed by many others. The atmosphere created by this situation has, I believe, impacted adversely upon our efforts in the judicial system. I accept the state of facts as a normal burden to be borne by an organization with highly controversial views which views have been viewed with hostility by many in positions of power in the United States. The treatment that Liberty Lobby, Inc. has been afforded in this case is in my view distinguishable from

all treatment afforded to Liberty Lobby in other cases. It is only because it is so different and because the facts of what appear to be personal relationships have entered into this case, that this motion for recusal is made. Since Judge Jackson has stated that he would have awarded costs to our adversary had there been a written opposition to our motion to compel, when in fact that motion, due to the Court's intervention produced for the first time from the relevant witness the stipulation that The Wall Street Journal did have standards, it would seem unfair for Judge Jackson who had so ruled to make a determination on the sanctions question.

The Facts

I.

LEONARD GARMENT, ESQ. AND THIS CASE

The article in question was written by Ms. Suzanne Garment, who according to her testimony is the wife of Leonard Garment, Esq. (Garment Depo., November 18, 1985, p. 148) The article was written by Ms. Garment when counsel for National Review, Inc., the publication associated with William F. Buckley, Jr., contacted her and asked her to write the piece. Mr. and Mrs. Leonard Garment subscribe to The National Review, and Mr. Garment has performed as an entertainer at at least one major function of The National Review. Leonard Garment, Esq. had a relationship with William F. Buckley, Jr. and through that relationship Suzanne Garment met William F.

Buckley and attended a dinner at Mr. Buckley's home. (Garment Depo., November 18, 1985, p. 148) As a result of the introduction arranged by Leonard Garment, Ms. Garment met with and talked with Mr. Buckley on several occasions. (Garment Depo., November 18, 1985, pp. 148-149) While Ms. Garment said that she did not remember the details she did concede that she had met with Mr. Mahoney, counsel for National Review, Inc. before he approached her with the suggestion that she write the article in question. (Garment Depo., November 18, 1985, p. 149)

Ms. Garment revealed, through her deposition, that she did not know the precise meaning of the word defamation and knew even less about New York Times v. Sullivan, which she referred to both

in her notes, which she created regarding her initial discussion with Mr. Mahoney about the article, and in her deposition as "the Sullivan Doctrine." She did not know if the "doctrine" was a text on libel law written by a man named Sullivan.

The article which pretended to be, according to Ms. Garment's testimony "about libel suits as a means of presenting the truth," (Garment Depo., November 18, 1985, p. 5) was purportedly written by Ms. Garment as an expert. She apparently was attending her first civil case. Ms. Garment stated that she did not talk to any one at The Wall Street Journal about doing a column for the case. (Garment Depo., November 18, 1985, p. 150) However, Ms. Garment testified that she did discuss

the proposed column with her husband, Leonard Garment, Esq. (Garment Depo., November 18, 1985, p. 150) As to the nature of that discussion, the record is silent as a result of the objection by counsel for the defendants who asserted that such discussions "would be privileged" and due to his instruction to Ms. Garment. (Garment Depo., November 18, 1985, p. 155) Regarding a specific question on the relationship between Mr. Garment and the law firm of which Mr. Mahoney was a member, the record is similarly silent due to the instruction by counsel for the defendants to Ms. Garment not to answer the question. (Garment Depo., November 18, 1985, p. 156)

The article by Ms. Garment asserted that Liberty Lobby, Inc. was anti-Semitic and the deposition of Ms. Garment led one to conclude that, as the defendants were later to assert in their pleadings, opposition to the political concept of Zionism is in fact anti-Semitism. During October 1975, when the General Assembly of the United Nations overwhelmingly adopted a resolution declaring Zionism to be a form of racism, Mr. Garment, then a representative of the United States at that body, said that the resolution was an "obscene act," that it officially endorsed anti-Semitism and would "place the work of the United Nations in jeopardy." Thereafter Ms. Garment implied in this case that opposition to Zionism is anti-Semitism.

Surely, Mr. and Ms. Garment have the right to maintain and publicly express their views on political matters. Mr. Garment has the right to assist his wife in introductions to conservative politicians and writers and publishers, and to guide her when she writes about involved legal matters and concepts about which she has demonstrated she is almost totally ignorant. Very likely the details of all such discussions are privileged communications between husband and wife. However, the relationship between one of those parties and the Court, should such a relationship exist, should be made known to both parties and any appearance of impropriety should be resolved in favor of a motion to recuse if such motion is made.

II.

LEONARD GARMENT AND THE
NIXON ADMINISTRATION

According to the testimony of Suzanne Garment, Leonard Garment, Esq. was counsel to President Richard Nixon while Mr. Nixon was President of the United States. (Garment Depo., November 18, 1986, pp. 155-156) According to the New York Times, May 1, 1973, Mr. Garment was appointed counsel to the President and that he succeeded John Dean, Esq. in that capacity when Mr. Dean was dismissed during the Watergate scandal.

According to the New York Times, Mr. Garment had suggested that John N. Mitchell would make an excellent campaign manager for Mr. Nixon.

Clearly one of the primary functions of the new special counsel to President

Nixon in the midst of the breaking Watergate scandal which resulted in the seven federal indictments nine months later for participating in a conspiracy to cover-up the facts, was to try to manage the situation on behalf of the President.

III.

JUDGE JACKSON AND THE
NIXON ADMINISTRATION

It is my belief that a reasonable conclusion can be drawn from the facts that Mr. Garment had responsibilities as counsel to the President regarding at least two matters of serious concern to Mr. Nixon. One was the indictment of seven persons for the cover-up conspiracy referred to above. The other was a lawsuit filed against the Committee for the Re-election of the President referred to in the press as

CREEP. In both of these matters Thomas Penfield Jackson, Esq. appears to have had an involvement.

One of the persons indicted was Kenneth Wells Parkinson, Esq., a partner in the law firm of Jackson, Laskey & Parkinson and therefore apparently a partner of Thomas P. Jackson's. Mr. Parkinson was later acquitted of the charges against him and nothing in this affidavit is intended to indicate that I believe that that decision was in any way inappropriate. The innocence of Mr. Parkinson is not at issue; the involvement of Mr. Thomas Jackson with Mr. Leonard Garment is.

After Mr. Garment suggested that John Mitchell be chosen as campaign manager for Richard Nixon, a lawsuit was filed by Common Cause against President

Nixon's Finance Committee to Re-elect the President according to The Washington Post, May 28, 1982. According to that same story Thomas Penfield Jackson was "perhaps best known for his work as a lawyer for President Nixon's Finance Committee to Re-elect the President." The article, submitted herewith as Exhibit 1, written by Al Kamen, a Washington Post staff writer, stated that Mr. Jackson "defended the Committee against a suit brought by Common Cause, which was seeking the names of all campaign contributors." That article also stated that Mr. Jackson had been a partner in the law firm of Jackson, Campbell and Parkinson for fourteen years.

According to a story appearing on the front page of The Washington Post,

including a five-column photograph and caption across the top of that page, submitted herewith as Exhibit 2, Mr. Thomas Jackson and his partner Mr. Parkinson [apparently incorrectly identified as Dennis B. Parkinson by The Washington Post in the caption but referred to in the body of the story as Kenneth] were counsel for Mr. Mitchell and accompanied Mr. Mitchell as his attorneys in defense of a one-million dollar civil suit against the Watergate suspects. According to the article in The Washington Post, Mr. Mitchell "answered only such questions as his 'name, rank and serial number,' according to a spokesman for the Committee for the Re-election of the President."

According to the Los Angeles Times, October 5, 1972, Mr. Kenneth W. Parkinson also served as an attorney for the Committee to Re-elect the President.

During 1973 Liberty Lobby, Inc. secured an affidavit from Glen C. Parker in which Mr. Parker offers information to the effect that Mr. Mitchell had allegedly stated that it was useful to discredit Liberty Lobby, Inc. because Liberty Lobby had been a thorn in the side of the administration for some three years. Mr. Parker's affidavit is submitted herewith as Exhibit 3.

IV.

CONCLUSION

All of the relevant information has not been examined by me due to two factors. The role of Mr. Garment and his possible association with the law

firm that represented National Review, Inc. could not be explored, even though a representative of that law firm suggested that the article in question be written, due to the claim of privilege by the defendants.

The rule of secrecy which surrounds all but the brief public record regarding the nomination of Mr. Jackson to be a United States District Court judge, has prevented me from examining additional information.

I believe that a reasonable person examining the record referred to in this affidavit would be constrained to conclude that Mr. Garment and Judge Jackson had previously maintained, at the very least, a close and continuing professional relationship regarding matters surrounding the Watergate episode. Mr.

Garment suggested that Mr. Mitchell direct President Nixon's campaign. Thereafter, Mr. Jackson represented Mr. Mitchell and apparently his law firm represented as well the Committee to Re-Elect the President.

Mr. Dean was discharged as special counsel to the President as the Watergate expose was taking place. Mr. Nixon chose Mr. Garment for that position to help manage what was obviously the single most serious question facing the President, the containment of the Watergate information. The matter, not contained, led to the resignation of the President of the United States. At that time Mr. Jackson's own law partner was indicted by the United States Government for alleged participation in Watergate related misconduct.

Mr. Jackson represented Mr. Mitchell and it is asserted that Mr. Mitchell approved of an effort to discredit Liberty Lobby, Inc.

The record of this case, set forth above as background, reveals that after the Garment connection emerged in the Dow Jones & Co., Inc. case, Judge Jackson adopted an entirely different approach to the plaintiff and its counsel.

A reasonable person would be constrained to conclude that Judge Jackson was obligated to inform the parties of his previous professional relationship with Leonard Garment, Esq. Particularly is this so when Liberty Lobby, Inc. asked the Court to recuse itself because of what appeared to be favored treatment for Ms. Garment and unprovoked hostility

toward Liberty Lobby, Inc. Surely at that time Judge Jackson should have revealed his previous professional association. Instead, he refused to allow Liberty Lobby, Inc. to offer reasons for the motion to recuse. At that time neither Liberty Lobby, Inc. nor its counsel had any information whatsoever linking the Court to the parties. The inquiry into that relationship flowed from the apparent partiality by the Court to Ms. Garment.

When Mr. Jackson appeared before the Committee on the Judiciary of the United States Senate, he testified as follows:

MR. JACKSON: Mr. Chairman, it is my intention to recuse myself automatically on any matter involving a former client of mine or in any matter involving my law firm. To the extent that there is any other extra-judicial contact between me and any litigant appearing before me, I will make a full disclosure of that to the parties and will recuse

myself from the matter should I be requested to do so.

Perhaps it can be said that Ms. Garment was not a litigant since she was not a party to the action. However, the motion was to compel her testimony and I believe that she therefore was a party before the Court.

Based upon the statements contained in this affidavit I believe that Judge Jackson has a personal bias or prejudice against Liberty Lobby, Inc. and in favor of Dow Jones & Co., Inc., and I thereby request, pursuant to Title 28 United States Code §144, that the Court proceed no further regarding any matter, including the motion to recuse, the motion for sanctions filed by Dow Jones & Co., Inc. against Liberty Lobby, Inc. and Mark

Lane and the motion to stay the proceedings, and that another judge be assigned to hear this proceeding.

Pursuant to Title 28 United States Code §455 I respectfully request that Judge Jackson disqualify himself from participating any further in considering the motion for sanctions filed by Dow Jones & Co., Inc. against Liberty Lobby, Inc. and Mark Lane, and all other pending matters and motions because I believe that, as the facts set out in this affidavit demonstrate, Judge Jackson's impartiality might be reasonably questioned.

WILLIS A. CARTO

District of Columbia, ss:

I, Lois Petersen, a notary public in and for the District of Columbia, do

hereby certify that Willis A. Carto personally appeared before me in said District, the said Willis A. Carto being personally known to me as the person whose name is subscribed to the within instrument, and swore and subscribed to the same before me.

Given under my hand and seal this
25th day of September, 1986.

Lois Petersen

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. NO. 84-3455
LIBERTY LOBBY, INC.

v.

DOW JONES & COMPANY, INC.

FEBRUARY 27TH, 1986

WASHINGTON, D. C.

Whereupon, the above-entitled matter
came on for hearing before the Honorable
Thomas P. Jackson, United States
District Court judge.

Appearances:

Mark Lane
For the Plaintiff

Robert Lo Bue
For the Defendant

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Pages: 1-39

Phyllis Merana
Official Reporter

P R O C E E D I N G S

The Deputy Clerk: Civil Action
Number 84-3455, Liberty Lobby, Inc.
versus Dow Jones & Co., Inc.

Mark Lane For the Plaintiff

Robert Lo Bue for the Defendant.

The Court: All right, Mr. Lo Bue,
have you taken the depositions of the
three people?

Mr. Lo Bue: Your honor, we've
determined that we do not need to take
those depositions.

The Court: Very well.

There are two matters that we have
presently at issue at the moment. Mr.
Lane's motion to strike your letter to
me making corrections to the document,
which I'm going to deny as moot since
the letter doesn't become a part of the
record, in any event. It's simply an

errata sheet. That's all. Isn't it
Mr. Lane?

Mr. Lane: I don't know what it is,
your honor. He has submitted documents
with it as evidence, in addition to the
letter.

The Court: He has substituted docu-
ments for others which had been attached
to his earlier motion.

Mr. Lane: Yes.

The Court: What's wrong with that?

Mr. Lane: Well, I think that the
court set a deadline for this, and if
it's going to be changed, we have a
right to be heard.

The Court: Mr. Lane, if he dis-
covers that he has made an error in
attaching exhibits, isn't he duty-bound,
as an officer of the court, to correct
the record?

Mr. Lane: I believe, according to the Federal Rules of Civil Procedure, he's duty-bound to make a motion for leave to correct the record, not sent a letter to the court, because that becomes a fait accompli. Apparently the court has accepted this.

The Court: I am going to let him substitute exhibits which he has erroneously attached to an earlier filed submission.

Mr. Lane: Very well, your honor, if that's the court's order.

The Court: Now, if you want to think of some substantive ground on which they could be stricken, i.e., they're forgeries, or they were procured by fraud, or something of that nature, that is one thing. But I'm not going to make his letter a part of the record,

and I am going to allow him to substitute exhibits which he, apparently, erroneously, but innocently, attached to an earlier submission.

So your motion to strike is denied as moot.

Now, you are renewing your motion to compel the testimony of Suzanne Garment, notwithstanding my earlier ruling?

Mr. Lane: No, your honor. I am not. May I be heard on that question? I'm not renewing it.

I asked previously for an opportunity to continue the disposition of Miss Garment, which this court denied on the grounds that it had gone almost fifteen hours.

The Court: That's correct.

Mr. Lane: Now, we have specific questions which she has refused to

answer--specific areas which she has refused to answer. We have submitted to the court our motion and statement of points and authorities and substantial portions of the record.

However, before I get into this, I should say that Mr. Lo Bue has not responded. There is no opposition to this. If the court wants to hear this in the absence of a written opposition, I'm prepared to proceed, if that is what the court wants to do.

The Court: All right. Yes. I will entertain an oral opposition.

You tell me what you feel that you have to ask her which you didn't ask her during the preceding fourteen plus hours of deposition.

Mr. Lane: It is not what I did not ask her, your honor. It's what she

refused to answer. That is why this is a motion to compel her to answer questions which she refused to answer, not questions which I failed to ask her, your honor.

The Court: All right.

Mr. Lane: This is the first point. The first cause of action in this case deals with the publication in The Wall Street Journal of an allegation which the plaintiffs consider to be defamatory.

The second cause of action deals with the republication of that same statement, after the defendants learned that their original statement was untrue, as they have conceded in pleadings since that time. They admit it's untrue. They say that substantially it's true. It's untrue that Liberty Lobby published this Nazi's books, et

cetera, but that since Willis Carto is a major factor in Liberty Lobby, because of the relationship between Liberty Lobby and The Spotlight, which was a close one at that time--they published it--and because in their view, the view of the defendants, that Mr. Carto was related to the publisher which did, in fact, publish Mr. Pearson's article, that substantially it was all right to say something, which, in fact, is untrue.

That was before. We then filed the complaint in this case. They then repeated this in an article ostensibly written by Suzanne Garment. Despite every effort we have made through discovery, to this day we have no idea who wrote the piece which comprises the second cause of action in an article by Suzanne Garment. She says she didn't do

it. And as we see through an examination of the discovery of Miss Garment, she was led by her attorney to refuse to answer questions and on occasion to say, "I don't recall," when relevant questions were asked.

There is no way we can determine whether or not actual malice was involved, which, indeed, is our obligation when the dispositive motions are considered, without even knowing who wrote it.

Miss Garment confessed during the deposition that she was unaware of any of the facts which led to the conclusion in the second cause of action, which was published in her article.

The Court: Give me the question that you put to her that you think she didn't answer.

Mr. Lane: Yes, your honor. This is on page three of our statement of points and authorities.

The Court: Well, you have got a deposition transcript apparently.

Mr. Lane: Yes. And we cite it. It's on page 161 through 162.

The Court: I, apparently, start with page 512.

Mr. Lane: We didn't attach all of the pages, but we did quote extensively on page three of our statement of points and authorities that exchange.

"Q Did you write anything about it, an ongoing lawsuit?"

"A I really don't remember."
And I said, "Well, did they just throw this into your article or did they make a change from what you had written?"

I was referring to the sentence which comprises the second cause of action. And Mr. Lo Bue and Miss Garment

then had a discussion off the record while the question was pending. I pointed out that that was not appropriate and I asked the question again. I said, "Had you written anything at all about a pending lawsuit which was changed into this language, or was this language just inserted into the article."

And Mr. Lo Bue interjected: "Just testify to your recollection. If you don't recall, the answer is you don't recall."

And then she answered, "I really don't. I am sorry."

The Court: Well, you have an answer. You may not believe it, but you have an answer to the question.

Mr. Lane: We have an answer based upon the interjection by counsel to say,

"If you don't recall, just say you don't recall."

The Court: Mr. Lane, when you try the case, you can suggest to the trier of fact that the answer derives from counsel, and you can do all of the things that skilled counsel, as you, undoubtedly, are, can do with an answer such as that, having been preceded by an admonition from the witness' attorney. Nevertheless, you have an answer to the question.

Mr. Lane: All right. Then we try to find out on what basis that was inserted into the column. We are now talking about the statement which comprises the entire second cause of action. Page six, your honor, of our statement of points and authorities.

She said she talked to Mr. Lo Bue and that talk was related to a column that she was writing.

And I said, "All right. So you were asking Mr. Lo Bue for information regarding Exhibit A, your writing of Exhibit A," which, in fact, was the article.

He objected to the question and told her not to answer the question and, therefore, she refused to answer the question.

The Court: On attorney-client-privilege grounds.

Mr. Lane: I presume. Let's see what it says. Yes, that's what he stated, your honor.

The Court: All right. Now, do you have evidence that it is not within bounds of the attorney-client privilege?

Mr. Lane: We are entitled, your honor, to determine who was responsible for the document which becomes the second cause of action. If a lawyer wrote it, we have the right to know that. That's the basis of the lawsuit, your honor.

The Court: You may very well have such a right. I haven't said you don't. The question is whether or not you can get more answers from Miss Garment.

Mr. Lane: Yes. We think she should answer the question.

The Court: Not if it's within the scope of the attorney-client privilege.

Mr. Lane: It is our position that it is not, your honor.

The Court: What is your evidence that it is not?

Mr. Lane: That if, in fact, the lawyer told her to write something which was defamatory, we are entitled to discover that.

The Court: Do you have evidence that a lawyer told her to?

Mr. Lane: I don't know what the lawyer told her. This is what she said, your honor. She said she did not have any information about it. She did not write it herself. She talked to Mr. Melloan, her supervisor. Mr. Melloan had had a conference with Mr. Lo Bue and said, "The lawyers want to make this change, and here it is." And we are not entitled, according to the defendants, to determine who wrote that.

She, no doubt, knows the answer to that question, but they are claiming attorney-client privilege and saying,

therefore, they do not have to tell us that.

I said, "Did Mr. Lo Bue tell you anything which later resulted in your writing something or including something in Exhibit A?" Exhibit A is, in fact, the column which is the basis of the lawsuit.

And Mr. Lo Bue told her she could not answer the question. That's at page 7, your honor, which is pages 356 and 357 of her disposition.

Then I asked, "Now, has anything been published in Exhibit A as a result of information given to you by Mr. Lo Bue?"

And she was instructed not to answer that question. We're entitled to know that, your honor.

The Court: No, I don't think you are.

Mr. Lane: You think we are not?

The Court: Right.

Mr. Lane: All right.

Then I asked her--this is page nine, your honor, of our statement of points and authorities and pages 165 and 166 of her testimony--"did you know there was a lawsuit pending between Dow Jones and Liberty Lobby before you talked to Mr. Mahoney?"

Mr. Mahoney is the person who was the attorney for National Review, the other part in the lawsuit, who told her she should write this piece.

I won't read the long answer, which is one long paragraph and one short one, set forth on page nine. she rambles around and never answered. When she

began to get to it--she said, "I got a call from Mr. Mahoney who said, 'I just thought you should know about this, that ther is a suit against Dow Jones.' And--" At this point Mr. Lo Bue interrupted her and said, "I think you have answered the question," when she had just begun to answer the question. And I said, "If you are still answering, please continue." And she said, "That was all it was."

The Court: I think she answered the question.

Mr. Lane: Well, your honor, what do you think "and" and two dots after that, interrupted by Mr. Lo Bue might have led to, since you believe that she answered the question, had Mr. Lo Bue not interrupted?

The Court: I do not know.

Mr. Lane: Neither do I, your honor.

I recall, your honor, at the very beginning of this proceeding, you said to us, an admonition which I took very seriously--you said, "take the presumption that just about everything is discoverable."

The Court: That's correct.

Mr. Lane: We have opened our files. They have gone through the files. They've taken everything. And we've given them everything. Nothing has been hidden."

When the court gave them permission to depose three more people, Mr. Lo Bue sent a letter to me and said, "We may not want to depose that, but tell us everything you know about what they've going to testify." In connection with the court's admonition, I wrote back and

said, "the court never said we have the responsibility to tell you everything that the witnesses will testify to, but, nevertheless I will tell you."

That has been our posture from the beginning. We have taken the court's admonition seriously and despite every effort on our part, we cannot find out who wrote the document which comprises the second cause of action, despite all of our questions.

The Court: Well, I don't know what took place during the balance of that deposition.

Mr. Lane: Well, you can tell the relevant portions because I've set them forth for the court.

The Court: But either Miss Garment herself does not know, or she has been told by somebody else, who may or may

not be a lawyer. In any event, it has been told to her in circumstances in which the privilege is available.

Mr. Lane: All right, your honor.

The Court: And those things are not discoverable, which, according to the provisions of the Federal Rules, are privileged. That's one of the things that is not discoverable. Most other things are, but privileged matters are not.

Mr. Lane: I have a very different view of the privilege as opposed to the court's view, but, of course, the court's view will prevail here.

Now, at page 11, your honor, of the statement of points and authorities, now that we have developed earlier that Miss Garment did not write everything in her column which appeared there, and since

we have the burden of establishing actual malice for anything that we are suing for, I said, "Did you write in your column, which is not the subject of this lawsuit, that, in words or substance, that the National Review sought to over the years be a responsible voice for conservative, as opposed to the crazies on the right?"

"Mr. Lo Bue: I object. The editorial column speaks for itself. Do not answer that. Please certify that to same you some breath."

So although we have now the ostensible author admitting that she did not write everything in the column, we are not now entitled, according to Mr. Lo Bue, to ask her what she did write and what she did not write.

We think we're entitled to an answer to that question.

The Court: All right. Is your objection correctly stated there, Mr. Lo Bue?

Mr. Lo Bue: Yes, but may I expand on it now, you honor?

The Court: Yes, you may. I suppose the question is asking her, at least as Mr. Lane puts it right now, whether or not she wrote in her column the words or substance that he is referring to, rather than does the column say in words or substance.

Mr. Lo Bue: That is certainly not the way I understood it in context at the time, but I would like the court to understand this. The court does not have the entire deposition before it. However, it is crystal clear on the

record that Suzanne Garment wrote that column. After she wrote it, or the first draft of it, three sentences were changed by her editor, George Melloan, in New York City as a result of his consultation with counsel. Mr. Melloan knows exactly which three passages those are. Everything else was written by Miss Garment.

In that context, questions like this--"Did you write sentence number one and did you write sentence number two," when it has already been established that she wrote everything except those three passages--we thought were objectionable.

The Court: I think I have the picture now.

Mr. Lane?

Mr. Lane: It is true that she said--when asked, "What did you not write," she listed three areas, but we are not bound by that answer. We are permitted to ask, when other questions come up, "Did you write this portion." We're not bound by her original assertion. We're entitled to an answer to this question.

The Court: The motion to compel a further answer to that question is denied.

Mr. Lane: Now, of course, as the court knows, there is a difference between that which is offered as fact and that which is offered as opinion in terms of the rights of the defendants.

At the bottom of page 11: "Did you write in the Wall Street Journal,

October 11th, that this is an opinion-- in words or substance--this is an opinion which I have formed over the years" ... continuing on, "Or did you assert it as a fact?"

"Mr. Lo Bue: I object. The column speaks for itself."

The Court: It also calls for a legal conclusion.

Mr. Lane: All right.

The Court: Denied.

Mr. Lane: Part of Miss Garment's article was one of a defense of the National Review--defense of what it stands for and defense of the major contributions that it made politically in the country.

She has subscribed to the National Review, she testified. She attended banquets for the National Review. She

was seated, according to a recent issue of the National Review, at the last banquet with Mr. Buckley, Priscilla Buckley and President Reagan. She is very active with the National Review and has an abiding hatred for Liberty Lobby and The Spotlight, all of which I think is relevant on the question of determining actual malice.

The Court: All of which may be matters that you can call to the attention of the trier of fact.

Mr. Lane: Yes, your honor. That's just a prelude for my next question. Page 13 of our statement of points and authorities. This being so, I asked Mr. Garment, who had written about the important role and constructive role played by the National Review over the years, vis-a-vis Liberty Lobby and The

Spotlight: "Since you know what the National Review stands for, at least in part, tell us where you agree with the National Review."

"Mr. Lo Bue: I object. The form of the question is misleading and argumentative."

"You may answer to the best of your ability."

"Answer: At the most general level, I sympathize with the mistrust that I see in its pages of very big government."

"Question: Anything else?"

"Pause." It was a long pause, actually.

"Mr. Lo Bue: I'm going to object to this line of inquiry further in that you're asking the witness--the question should not reasonably be answered without some research and review."

So now we have an objection based upon failure of time for research and review, regarding a columnist, who has written on that very question which is at the heart of the matter of our attempting to establish bias.

The Court: I think the objection is well-taken and the question is at least argumentative. I can't tell whether or not it's misleading. It's also a vague general question of only marginal relevance.

Denied.

Mr. Lane: Well, going back to the court's admonition that almost everything is discoverable, it doesn't seem to have much application to any of the questions that I've asked, your honor.

We discovered in the deposition that some of the false information published

in the article by Miss Garment, including identity of persons at counsel table for Liberty Lobby, including myself and my colleagues there--that all of that information was secured by Mr. Mahoney, who was counsel for the National Review.

In view of the fact that we established that she published information which was not true about us, which she secured from Mr. Mahoney--and she was in the courtroom with us--I asked her if she talked to any of us, and she said she did not.

I said, "Looking back now, Miss Garment, do you think the best way to find out what you consider to be non-controversial information about the participants in a case is to ask the person for the best information?"

She said, "It depends on the circumstances."

And then I went on on page 15 to go into the circumstances which she had described.

I said, "Well, you asked the people at Mr. Mahoney's table and you got the wrong information"--which she had already conceded--"and you then published the wrong information in the Wall Street Journal."

"I'm asking you, looking back on this, do you think it would be better to have asked this young black woman whether she was a lawyer or a law student or a graduate?"

And Mr. Lo Bue objected to that question.

The Court: On the ground that it was argumentative.

Mr. Lane: Yes.

The Court: I agree that it's argumentative. The objection is sustained. The motion to compel is denied.

Mr. Lane: Part of Miss Garment's article was devoted to a very cruel, I think--certainly strong attack upon counsel for Liberty Lobby in the opening statement.

It should be understood that Miss Garment had never been in a courtroom before where a civil case was tried, first of all.

Secondly, she said she had been in some courtrooms where there were criminal cases, but she believed--she said, "Isn't it true that criminal cases and civil cases are often tried together? It's like one case with different parts."

This is the authority for the Wall Street Journal on the question of defamation.

Since she had established nothing more than her bias and her abiding ignorance of the law in this matter-- and, parenthetically, I might add that she was told by Mr. Mahoney, who called her and told her to write about this case, that the Sullivan Doctrine meant that the Liberty Lobby and The Spotlight didn't have a prayer. I asked her what the Sullivan Doctrine was. And she said she didn't know. I asked her if it was possible that it was a textbook on defamation written by a Professor Sullivan and she said she didn't know. She didn't know if it was a Supreme Court case.

This is the authority on public defamation for the Wall Street Journal, who has written an editorial page comment on this.

Having established her ignorance and all there is of law, I honed in on her cruel, I thought, attack upon the opening statement which we had made about the National Review. And her response was--

The Court: This is what you contend to be her mischaracterization or misrepresentation of your opening statement, is that correct?

Mr. Lane: Yes. The whole article is about that. That's all it's about. The article is only basically about the opening statement. She was there for the opening statement and then she left and she wrote the piece. She didn't

even know what the result of the case was when she was deposed weeks later, long after the case was over. She didn't know what the result was.

I her assertion, she attacked the opening statement which was made. And when I asked her why, she said it was because I didn't give the historic background in which all of these things had occurred.

And then I asked her if she knew what the rules are that govern lawyers in their opening statements--What they're permitted to say and what they are not permitted to say, and she said, "I have no specific knowledge." That's at page 480 of her deposition.

Then I asked her this question, which flowed from that:

"How can you be critical of an opening statement made by a lawyer because it left out some historic context about the history of a movement in America if you don't know whether or not the lawyer is even permitted to discuss that, even if he wanted to?"

And the fact is, your honor, that I did attempt to give the historic background. Mr. Mahoney objected, and there was a discussion, and Judge Green ruled--and very likely, corrected--that I could not go into this very area. And so I did not.

The Court: Is that the question that you want answered?

Mr. Lane: Yes. Mr. Lo Bue said, "I object to that question as argumentative and personalized and I instruct the witness no to answer."

The Court: I sustain the objection. The motion is denied.

Mr. Lane: May I understand the reason for that, your honor?

The Court: Yes. The flavor that I get of this entire deposition is that it was largely conducted by you out of pique at the way in which you feel that Miss Garment characterized your performance in another trial.

It is also, tangentially, an attempt to perpetuate some sort of a vendetta between Liberty Lobby and the National Review, which I do not intend to allow to become part of this particular lawsuit.

Mr. Lane: Your honor, based upon the court's statement, which is, in my view, entirely unrelated to the facts in this case, and based upon the court's

direction to me--in essence, warning to me--not to bring a lawsuit against Mr. Mahoney and Mr. Lo Bue and Mr. Lo Bue's law firm, I respectfully request the court to consider recusing itself in this matter.

The Court: Are you making a motion to that effect?

Mr. Lane: Yes, your honor.

The Court: The motion is denied.

Mr. Lane: May I be heard on the motion?

The Court: No.

Mr. Lane: Very well, your honor.

The Court: I do not intend to hear you on that motion any further.

Mr. Lane: Yes, your honor.

On page 19, your honor, continuing, on, which is page 481 and 482 of the deposition.

"Question: May a lawyer say in an opening statement anything other than what the lawyer intends to prove at the case through the use of evidence?"

"A I don't know."

This is someone who has critiqued an opening statement.

The Court: I don't care what her credentials are. You have an answer to the question. "I don't know," she says.

Mr. Lane: Yes, your honor. If the court will just bear with me for a moment. That is not what we're objecting to. That's the prelude, your honor.

The next question is: "You don't know?"

"No."

Then the next question:

"How can you be critical of an opening statement which does not include

information which you would like to have seen present if such information may be proscribed."

There was an instruction not to answer.

We're entitled to an answer to that question, your honor.

The Court: I ruled on that. I agree that it's argumentative, and I agree, moreover, that it's argumentative and personalized in view of the context in which it was asked.

I sustain the objection and deny the motion to compel.

The next question?

Mr. Lane: Yes, your honor. Page 21 of our statement of points and authorities.

I suggest that the standards that the Wall Street Journal may have, which

apply to persons who write articles for it, since Dow Jones, the publisher of the Wall Street Journal, is a defendant in this case, are neither personalized, nor argumentative or related to anyone's pique. I think the standards are objective criteria which we are permitted--in fact, obligated--to determine.

As you can see from looking at page 21 of our statement of points and authorities, I asked the question, "Does the Wall Street Journal, to your knowledge, have any standards which apply to persons who write for it."

And the court was concerned that we spent almost fifteen hours. Sixteen pages, which we have appended to this motion, were expended in trying to get the answer to the simple question.

The Court: Simple question?

Mr. Lane: Yes. "Are there any standards?" That's a simple question. "Does the Wall Street Journal, to your knowledge, have any standards which apply to persons who write for it."

The Court: You mean it's simple in the sense that it calls for a "yes" or "no" answer?

Mr. Lane: And then a statement. "There are none." "They're published." "They're given to us by editors." Some explanation. Anything. But the next sixteen pages are spent in asking that question and obfuscation by the witness and the interjection of improper objections by counsel for the defendant.

Mr. Lo Bue: Your honor, may I point something out at this point?

Mr. Lane: May I continue, your honor?

The Court: No. Let me interrupt you. I want to hear what Mr. Lo Bue says about that.

Mr. Lo Bue: I would like to point out one thing. The question may be simple, but the answer under the circumstances was complex. The answer was given by the witness.

The Court: Well, it calls for a "yes" or "no" answer. Did she give a "yes" or "no" answer?

Mr. Lo Bue: Well, let me refer the court to page 522, which is appended to the motion, if I may, lines 4, 5, 6, and 7. The witness having already told Mr. Lane that there are no written standards that she knows about, then stated--

The Court: Where?

Mr. Lo Bue: On line four of page 522.

"If we are talking about the most victours, deliberate, knowing, provably knowing kind of misstatements, then, of course, it is unacceptable."

That's the standard she testified to. She can't create standards to satisfy Mr. Lane if they don't exist. And I am not sure what more the witness could testify to than her own knowledge as to what the standards she abides by is.

The Court: Well, undoubtedly there are standards that the Wall Street Journal has.

Mr. Lo Bue: The witness testified, as did Mr. Melloan, her editor, that there are no written standards that either one of them know.

The Court: No, but there are standards. They don't publish things that are libelous.

Mr. Lo Bue: That's true.

The Court: All right. That's a standard.

Mr. Lo Bue: And that is essentially what she testified to.

The Court: All right.

Mr. Lane: That is not what she testified to.

The Court: Would you stipulate that her answer would be "yes"?

Mr. Lo Bue: To the question: "Are there standards?"

The Court: "Are there standards?"

Mr. Lo Bue: Of course I would.

The Court: All right. You've got your answer to the question.

Mr. Lane: No, your honor. We spent sixteen pages and we could not get that answer.

The Court: You've got it now.

Mr. Lane: We do not have it now, your honor.

The Court: You've got a stipulation on the record.

Mr. Lane: That there are standards, but we don't know what they are.

For example, page 520, that's the first question. "Are there standards?" We could never get the answer. Obviously, there is another question that follows: "What are the standards?"

Page 520, for example, here is the question.

The Court: You want to know what the standards are?

Mr. Lane: Yes, your honor.

The Court: The standards in general?

Mr. Lane: Well, your honor, let me give you an example.

The Court: Let me ask you, is that your question: "What are the standards?"

Mr. Lane: Yes. We've been trying now for months to get an answer to that question.

The Court: That is not only argumentative, but it's vague and irrelevant. Any motion to compel the question as so rephrased is denied.

Mr. Lane: As to what the standards are?

The Court: Yes.

Mr. Lane: All right. Page 520, your honor, as to what are the standards. That's an irrelevant question?

The Court: In the context of this lawsuit, yes. This is not a general

inquiry into the editorial standards of the Wall Street Journal. This is a suit for libel.

Mr. Lane: The owner of the Wall Street Journal is the defendant, your honor. We're entitled to know what their standards are in terms of the people that write editorials for them.

The Court: Denied.

Mr. Lane: Page 520. She would not even tell us what a lie is. I asked her, "Is the Wall Street Journal allowed to publish lies?" "It depends on what you mean by lies."

And so we spend four pages on that question.

The Court: It's an argumentative question. The motion to compel is denied.

Mr. Lane: When she refused to tell us what a lie is, I asked her, "How about for the purpose of my asking you if you have any standards at the Wall Street Journal which tell editorial writers not to publish lies. Can you accept it for that question?"

Answer: "I would have to have something that had more context in it."

So even then she was not willing to say that the Wall Street Journal tells them not to publish lies.

The Court: I think that's an answer to that question.

The motion to compel that answer is denied.

Mr. Lane: I asked her, "Are there any standards at the Wall Street Journal which discourage editorial writers from publishing outright lies in editorials?"

Is there anything argumentative or personal about it?

The answer is: "I am sorry to do this, but I don't know what 'outright lie' means separate from the answer that I tried to give about knowing and unknowing."

Are we entitled to an answer to that question, your honor?

The Court: Which one is that?

Mr. Lo Bue: May I have the page?

Mr. Lane: Page 23 of our motion, statement of points and authorities and page 516 of the deposition.

"My question is now, when I am talking about an outright lie, I am not talking about a mistake. The question was about an outright lie. The question is, are there standards at the Wall

Street Journal which discourage editorial writers from publishing outright lies in editorials?"

"I am sorry to do this, but I don't know what 'outright lie' means separate from the answer that I tried to give about knowing and unknowing."

The Court: I think you've got an answer to that question, certainly all that you're entitled to.

The motion to compel is denied.

Mr. Lane: I asked her what a lie is, and she refused to answer that. That's page 23 of our statement, quoting pages 516 and 517.

The Court: You want a further answer to "What is a lie"?

Mr. Lane: What is a lie.

The Court: I can't imagine, in the context of this deposition, anything

that would be more argumentative and less intended to elicit admissible evidence in this case.

The motion to compel the answer to that question is denied.

Mr. Lane: Earlier in the proceedings, we asked the Wall Street Journal--we asked Miss Garment to provide--and Mr. Lo Bue said he would take it under advisement--those editorials which Miss Garment wrote in the past.

We are seeking now, because we're obliged to under the law as it exists at the present time, to uncover information as to the actual malice based upon the bias on the part of the author of the article. So we were seeking to secure editorials which she wrote, which were published in the Wall Street Journal,

dealing with those areas related to the column. And we specified them.

The Wall Street Journal has refused to make them available to us, and she has refused to tell us which editorials she has written.

Now, in terms of the columns which she has written, we can find those ourselves, of course, although I think that that is not an excuse for not making them available. But we can find them by examining the Wall Street Journal.

Since the editorials are unsigned, there is no way we can ever determine which of those editorials were written by Miss Garment. And they have refused to make that information available to us.

The Court: Where is the question?

Mr. Lane: This came in colloquy on numerous occasions with Mr. Lo Bue. I

think Mr. Lo Bue will agree that we have made motions about this in the past, your honor.

It is our position that we are entitled to secure from the defendant those editorials written by Miss Garment.

It's their position that this is somehow protected because, as they present it, their process is secret as to who writes what and who does what. And they refused to make that available.

The Court: That's not an issue that's before me right now because there is, apparently, not a question that was put to her.

Mr. Lane: We did ask her, and she said she would confer with Mr. Lo Bue. And then we got into discussions. And that is the final answer.

Mr. Lo Bue: May I respond, your honor?

The Court: Yes.

Mr. Lo Bue: I would just like to point out to the court that this precise issue was raised in the last motion to compel further testimony from Suzanne Garment. It was extensively briefed, and your honor ruled that we should not be obliged to produce unsigned editorials beyond the 196 pages of signed editorials that we produced in advance of the deposition and upon which Miss Garment was examined for several hours.

Miss Garment does not have a hidden agenda. Her opinions are open for all to see. She has examined on them. I submit there is no cause for having the Wall Street Journal--

The Court: You mean you produced in advance of the deposition the editorials that are concededly written by her?

Mr. Lo Bue: Yes.

Mr. Lane: No. No. No. The articles which she signed, but not the unsigned editorials which she wrote. They gave us the ones which we could get from the Library. They did not give us the ones which we cannot discover which ones she wrote. That's the answer.

The Court: And what was the reason for that?

Mr. Lo Bue: There are two reasons, your honor. First of all, as a matter of feasibility, it is virtually undoe-able. The problem here is that Miss Garment is a column writer. We gave them all of those signed editorial columns.

She also happens to be on the editorial staff. She may have input as a first-draft writer and an editor in some other fashion like any one of a number of editorials.

There is really no way to go back--I presume Mr. Lane is talking about every editorial ever written in the daily Wall Street Journal since she joined the staff several years ago.

The Court: And the whole purpose of this is to ascertain her mind-set on certain issues that you think are relevant to this case. Is that correct?

Mr. Lane: That's correct.

The Court: I think you have enough with 190 signed editorials to determine that.

Mr. Lane: You are denying my motion, your honor?

The Court: If there was a question asked that asked her to identify the writers of unsigned editorials, yes, the motion is denied.

Mr. Lane: There was such a question.

The Court: Well, I don't have it before me, but I'll assume that there was.

Mr. Lane: Is the court going to take up the so-called dispositive motions at this time, your honor?

The Court: I'm going to give you a date to argue those.

Mr. Lane: Well, the reply was due today, which we did not receive. And as far as I know, there was no order signed by the court extending the time.

Mr. Lo Bue: Your honor, we had submitted a motion for a short extension.

The Court: March 7th I think you asked for, is that correct?

Mr. Lo Bue: Yes, and we would like to submit a short reply.

The Court: All right. I thought I granted that motion, but if I have not, I will grant it. You may have until March 7th.

Mr. Lo Bue: Thank you.

Does the court wish to set a date for argument?

The Court: Yes, I'm about to give it to you as soon as Mr. West opens his red book.

The Deputy Clerk: Sometime after March 7th?

The Court: Sometime after March 7th. I would look for the latter part of March, Mr. West, so I'll have time to review the record.

Are you down from New York, Mr.

Lo Bue?

Mr. Lo Bue: Yes, I am.

The Court: All right. Then you would prefer 2:00 o'clock in the afternoon, is that correct?

Mr. Lo Bue: I think I would if that's feasible. I appreciate that.

The Deputy Clerk: The 27th.

The Court: The 27th at 2:00 p.m.

Mr. Lo Bue: Thank you, your honor.

The Court: Mr. Lane?

Mr. Lane: Yes, your honor.

The Court: All right. I'm denying the motion to compel further testimony from Suzanne Garment in its entirety. I have spent enough time in practice, Mr. Lane, as a trial lawyer myself to know an abusive deposition when I see one.

This, in my opinion, in an abusive, exploitive deposition, for the most part. It's argumentative and hostile and it is designed, in no small measure, to antagonize and harass the witness and, to a very little extent, to elicit discoverable information from this defendant for purposes of prosecuting this lawsuit.

You are fortunate, sir, that Mr. Lo Bue was not put to the trouble of having to file a written response to this. I would, had he done so, award costs and attorney's fees.

I assure you that it will occur in the future if there is further motion or a further deposition of this nature in this lawsuit.

Mr. Lane: May I say, your honor, that first of all I have practiced law

for 35 years. No judge in 35 years, in terms of hundreds and hundreds of depositions and appearances in court, has ever said anything similar to what this court has said to me now.

The Court: Then it's about time that it should happen, Mr. Lane.

Mr. Lane: All right, your honor. You're entitled to that position, but you would be more entitled to it had you read the deposition. I believe this deposition has not been filed.

The Court: I would ask you both to file a transcript of this deposition.

Mr. Lane: Yes, your honor.

May I finish, your honor? I think that the court has shown such hostility and bias toward my client and toward the cause of my client that the court should seriously consider recusing himself.

The Court: You made that motion and I denied it.

Mr. Lane: Yes, your honor. I know that. I did make that motion, but now I'm prompted by the remarks that the court has made, which are totally and absolutely unjustifiable and unjustified.

I have tried cases for years now. I have never seen such obfuscation and such an effort by counsel, as in the case of Mr. Lo Bue, to improperly interfere, to talk with his client while the question is pending, which is contrary to the rules--and it happened on numerous occasions--to threaten to walk out and to tell his client not to answer questions, which is what took fifteen hours.

The questions which we posed today are relevant questions.

We adhered to the court's admonition to make everything which might arguably be discoverable available to Mr. Lo Bue. We have done that.

This court has taken a position which is, in my view, totally unjustified, without any reading of the relevant documents in this case.

I ask the court to withdraw the remarks that you have just made.

The Court: Denied.

If there are any further fulminations of that nature, Mr. Lane, I will find you in contempt of court.

I would suggest that from this point forward, you confine yourself to proper forms of address to this court and to co-counsel.

Mr. Lane: Yes, your honor.

Would the court consider it to be contemptuous for me--

The Court: I am not going to argue with you, Mr. Lane.

Mr. Lane: No, I am asking a question--if the court would consider if contemptuous of me to file a written motion urging this court to recuse itself.

The Court: You may file any motion you desire which the rules permit.

Mr. Lane: Yes, your honor.

The Court: And I will rule on it in due course.

Mr. Lane: Yes, your honor.

The Court: Is there anything further, counsel?

Mr. Lo Bue: Nothing further, your honor.

The Court: I will see you on March
27th at 2:00 p.m.

Mr. Lo Bue: Thank you, your honor.

(Whereupon, the above-entitled
matter was adjourned.)

CERTIFICATE OF REPORTER

This record is certified by the
undersigned reporter to be the official
record of the above-entitled proceedings.

Phyllis Merana

EXHIBIT 1

District Lawyer
Picked for Seat
On U.S. Court

By Al Kamen
Washington Post Staff Writer

President Reagan has nominated Washington attorney Thomas Penfield Jackson to a seat on the U.S. District Court here vacated last November by Judge Oliver Gasch.

Jackson, 45, who is president-elect of the 4,500-member Bar Association of the District of Columbia, has been in private practice for 18 years in the firm of Jackson, Campbell & Parkinson. He has been a partner in that firm for 14 years.

Jackson is perhaps best known for his work as a lawyer for President

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Nixon's Finance Committee to Reelect,
the President.

THE WASHINGTON POST

May 28, 1982

EXHIBIT 2

Mitchell Mum on 'Bugging'

Not Involved At Watergate, He Asserts

By Carl Bernstein
and Bob Woodward
Washington Post Staff Writer

The secret testimony of former Attorney General John N. Mitchell, who was President Nixon's campaign manager at the time of the Watergate break-in, was halted yesterday when his attorney advised him not to answer questions about the incident.

Mitchell, who appeared promptly at 10 a.m. for a deposition hearing the Democrats' \$1 million civil suit against the Watergate suspects, answered only such questions as his "name, rank and serial number," according to a spokesman

for the Committee for the Re-election of the President.

Then, the spokesman said, Mitchell was advised by his attorney not to answer further questions, pending court action on motions filed late Thursday by lawyers for the five men arrested inside Democratic National headquarters on June 17.

Mitchell, a former law partner of President Nixon in New York, joined the administration at its outset as attorney general and resigned on March 1 to become manager of the President's re-election campaign. He resigned that position on July 1, citing his wife's insistence that he leave politics.

Following Mitchell's brief testimony yesterday, Kenneth Committee for the Re-election Parkinson, counsel of the

President and Mitchell's attorney,
issued the following statement:

Photo Caption: John N. Mitchell
(center) arrives for 20-minute talk at
law office accompanied by two lawyers,
Dennis B. Parkinson (left) and Thomas
Jackson.

THE WASHINGTON POST

September 2, 1972

OP11749762

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MAP 090101 9/1/72 WASHINGTON: John N.
Mitchell (center), who was President
Nixon's campaign chairman at the time of

the "Watergate paper," arrives at the law office of Edward Bennett Williams to make a sworn statement 9/1 about what he knows--or does not know-- about the alleged bugging. Williams is representing the Democrats in a \$1 million civil damage suit against the Nixon committee. Mitchell was accompanied by two attorneys, Dennis B. Parkinson (left) and Thomas Jackson (right). (UPI)

EXHIBIT 3

AFFIDAVIT OF GLENN C. PARKER

1. From June, 1971 to September, 1972
I lived in Arkansas. I am now a
resident of Los Angeles County,
California.
2. In later October, 1971, I was first
contacted by an aide to then-
Attorney General, John N.
Mitchell. This aide, whose name I
do not recall, telephoned me from
Washington, D.C.
3. The aide asked me questions about
the American Independent Party of
California, of which I was state
Vice-Chairman from January, 1969,
to January, 1971.

4. The aide asked me specifically if I would work with Robert J. Walters, with whom he had already been in contact, to remove the AIP from the California ballot. I was familiar with Mr. Walters from previous acquaintance. He suggested that I call Walters.
5. As I had business in California at that time I contacted Mr. Walters and agreed to help him in this project for a weekly retainer which I understood would be coming from the Committee to Re-Elect the President. My reason for so agreeing to help Mr. Walters was because I had been told personally by George C. Wallace in December, 1967 or January, 19679 that he would

never again run on a third party ticket.

6. On or above November 1, 1971, at 7 or 8 p.m., I met with Mr. John Mitchell, Mr. Jeb S. Magruder, Mr. Walters and five or six others who seemed to be aides to Mitchell and Magruder. We met in the Statler-Hilton Hotel, in downtown Los Angeles. At this time Mitchell and Magruder were concerned that in the event Muskie was nominated by the Democrats and Wallace by the AIP, the Republican vote would be split and Nixon would lose the state. They reasoned they would have to have California to win the election in 1972.
7. Mitchell and Magruder asked how Walters could help in the job of

getting the AIP removed from the California ballot. Mr. Walters convinced them that he had a very large following who would help us in this project. He mentioned a budget of \$10,000.

8. Two days later Mr. Walters was given twenty-five one hundred dollar bills, or \$2,500, by Jack Lindsay as the first payment on this budget.
9. Most of my duties consisted of contacting persons in different parts of the state. Mr. Walters meanwhile continued to organize from the Bell, California office and engaged various parties for the project.
10. In a conversation I had with Mr. Walters on or about November 25,

1971, he told me that he had managed to involve Liberty Lobby in this project by representing it to Liberty Lobby as an anti-busing campaign. He had been given a check by Liberty Lobby to pay for postage for a mailing he was organizing for them.

11. Approximately at this time Mr. Walters informed me that in a telephone conversation with John Mitchell that he had informed Mitchell that we were receiving a very negative response from the conservative element which he had hoped to enlist in this operation because the word was out that John Mitchell and the Committee to Re-Elect the President were behind it. Mitchell in turn had suggested

that something good could still be salvaged from the operation if Liberty Lobby, which had been a thorn in the side of the Administration for the past three years, could be discredited.

12. Following this, Mr. Walters began spreading the story that the finances behind the project were being contributed by conservatives around the United States, particularly Liberty Lobby. I know this to be false.

Glenn C. Parker

STATE OF CALIFORNIA

ss

COUNTY OF LOS ANGELES

Personally appeared at Los Angeles,
in said county, the signer of above
Affidavit, Glenn C. Parker, who acknowl-
edged the above to be his free act and
deed and to be true to the best of his
knowledge and belief, this ninth day of
July, 1973.

Before me, _____,

Notary Republic.

OFFICIAL SEAL

KATHELEEN G. WAREHAM

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion Asserting Bias or Prejudice of the Court and for Disqualification of Judge Jackson and accompanying Statement of Points and Authorities and Affidavit of Willis A. Carto in support thereof were mailed first class, postage prepaid to Robert P. LoBue, Esquire, Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, Ne York, New York 10112, on this day 25th day of September, 1986.

Mark Lane